FILE COPY

No. 464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
MORTON SALT COMPANY,
Respondent.

On Certiorari to United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

Petitioner in its brief has correctly cited the case below, it has properly indicated the basis of jurisdiction, and it has correctly cited and quoted the sections of the Clayton Act, as amended by the Robinson-Patman Act, which are involved in this case. (The sections are quoted in full in the appendix.)

However, instead of making a clear and concise statement of the facts concerning the standard quantity discounts involved, Petitioner, in its statement of the case, has chosen to supply this Court with only a condensed version of certain selected "findings of fact" replete with its own adjective coloration. Briefly, the basic facts are as follows (R. 2115-2117; 1339-1345):

1. A carload discount is granted on all orders moving as a part of a carload shipment (whether in straight cars to a given customer or as a part of a pool car to several customers). This amounts to 10¢ a case on the Blue Label

package and to approximately 5% of the f.o.b. plant price on all other table salt items. Except for one instance of reshipment out of a warehouse (R. 330), every single witness enjoyed the carload discount (R. 1300-1302). Moreover, of Respondent's total table salt business for the entire country, only 1/10 of 1% moved in less than carload lots (Resp. Ex. 17; R. 1466), and this fractional percentage is accounted for entirely by reshipments, for the customer's convenience, out of metropolitan warehouses to destinations beyond the area served by the warehouse (R. 282-4). (Note: the exhibits in this case have not been made a part of the printed record, so, of necessity, occasional reference must be made to the exhibits rather than to the record.)

2. To any customer purchasing 5,000 or more cases of Blue Label Salt in any consecutive twelve-month period, a discount of 10¢ per case is allowed. This is in addition to the carload discount where applicable. The carload price of the Blue Label is $1.50 per case and the less than carload price is $1.60 per case.

3. To any customer purchasing 50,000 or more cases of Blue Label salt in any consecutive twelve-month period, a discount of 15¢ per case is allowed. This is in addition to the carload discount where applicable, but it includes the 10¢ noted in item 2 above.

4. To any customer purchasing $50,000 or more of table salt in any consecutive twelve-month period, a discount of approximately 5% of the f.o.b. plant price is granted. This is in addition to the carload discount where applicable, but it is not paid on the Blue Label, although the purchases of Blue Label are included in the computation of the $50,000 qualification requirement.

5. These are all standard quantity discounts, open and

available to all customers of every class and description. The carload discount has been in effect since 1922, the 5,000 and 50,000 case discounts since 1927 or 1928, and the $50,000 discount since 1933 or 1934.

SUMMARY OF ARGUMENT.

At the outset, this Court should recognize this case for what it actually is, unencumbered by legal language and statutory involvements. Only one thing is at issue — the validity of Respondent's standard quantity discount system. The Federal Trade Commission in this case is seeking, through the assumed leverage of the Robinson-Patman Act, to condemn the standard quantity discounts which have been offered by the Respondent in an effort to promote the sale of its products, even though the discounts are open to all customers on equal terms. Standard quantity discount systems, like those of Respondent, have probably contributed as much as any other single merchandising factor to the existence and maintenance of keen competitive conditions in business, but if the Commission succeeds in this case, almost every merchandising operation in the country will be adversely affected.

Because the case does hinge on this one basic business and legal principle, the arguments regarding it can be stated in a clear and sequential fashion:

1. As a matter of statutory law, Respondent's standard quantity discounts, available to all on equal terms, as contrasted, for example, to hidden or special rebates, allowances, prices or discounts, are not discriminatory within the meaning of the Robinson-Patman Act. So the order below must be affirmed.

2. Even if the proposition set forth in paragraph 1 above be incorrect, the Modified Findings of Fact by the Commission do not in any wise support the Modified Order issued herein, and, lacking that support, the order of the Court below vacating the Modified Order and dismissing the Complaint should be affirmed.

3. Even if both the propositions set forth in paragraphs 1 and 2 above be incorrect, the evidence in no wise supports the Modified Findings of Fact, lacking which support the order of the Court below vacating the Modified Order and dismissing the Complaint should be affirmed.

4. Even if all the propositions set forth in paragraphs 1, 2, and 3 above be incorrect, the Modified Order itself, regardless of the Modified Findings of Fact and regardless of the evidence in this case, is entirely beyond the scope of the Commission's jurisdiction and beyond the scope of the Robinson-Patman Act itself, and, hence, the order below vacating it must be affirmed.

ARGUMENT.

I.

Respondent's Standard Quantity Discount System Is Not Discriminatory Within the Meaning of Section 2 (a) of the Clayton Act.

From the outset, Respondent has insisted, and Petitioner has never denied, that the Commission had the burden of proving that the standard quantity discount system of Morton Salt Company was discriminatory within the meaning of Section 2 (a) of the Clayton Act. Nor has Petitioner ever denied, for the record is clear, that those standard discounts have at all times been openly available on equal terms to all purchasers. The option to make use of those discounts has at all times been that of the customer and not that of Morton Salt Company.

Accordingly, the simple issue presented to the Court below was whether or not that burden of proof had been adequately discharged by the Commission. In holding that it had not, the Circuit Court of Appeals has apparently precipitated something of a legal panic on the part of the Commission, as evidenced by the rather confusing arguments contained under Points I and II of Petitioner's brief. However, an analysis of the Commission's arguments, as well as of Section 2 (a) of the Clayton Act and of the opinion of the Court below, should easily discharge any fears that the Robinson-Patman Act has been emasculated and should also remove any doubts as to the validity of the lower Court's decision.

Cost-Savings Clause Argument.

The basic argument of the Commission on this issue is a strange, negative one. It does not dispute the fact that it has the burden of proving discrimination, but seeks to escape the labor of that burden by insisting that Respondent prove cost-savings under the first proviso clause of Section 2 (a). So, because respondent made no effort on appeal to rely on cost savings, the Commission has quickly concluded that its burden of proof as to the existence of discrimination has been discharged. This simply does not square with the history of Section 2 (a).

Prior to the amendment of the Clayton Act by the Robinson-Patman Act, the Commission had never, so far as the Respondent can determine, succeeded in establishing with any federal court the proposition that standard quantity discount systems were discriminatory under Section 2 of the Clayton Act. See, for example, *Lipson* v. *Socony Vacuum Corporation*, 87F. (2d) 265, 260; *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 101 F. (2d) 620, cert. den. 308 U. S. 557. The Commission now seeks to do just that in this case, presumably on the theory that the Robinson-Patman Act somehow changed the law insofar as standard quantity discount systems are concerned. A careful comparison of Section 2 of the Clayton Act prior to the amendment, with Section 2 (a) of the Clayton Act after the amendment, makes abundantly clear that no such change in the law took place.

The basic provisions of the original Section 2 of the Clayton Act, excluding for the moment any reference to the various proviso clauses therein, read as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between

different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce:"

After the amendment by the Robinson-Patman Act, Section 2 (a) of the Clayton Act, also excluding the various proviso clauses, reads as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discriminations, or with customers of either of them:"

It will be observed that the basic language was altered in only two material respects, neither of which pertain to the question of standard quantity discounts. First, the phrase "of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce" was inserted; and second, there was added the clause "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either

of them." These additions by the Robinson-Patman Act obviously were designed only to broaden the test of injury to competition. They were not designed to change the meaning (nor did they) of the phrase "discriminate in price". In other words, both before and after the Robinson-Patman Act amendment, the basic prohibitory provisions of the Clayton Act were and are entirely silent on the question of standard quantity discount systems.

If, then, the Clayton Act subsequent to 1936 automatically regards standard quantity discounts as discriminatory, whereas it did not before 1936, the clue to this change must lie somewhere, if at all, in the proviso clauses. The first proviso clause of Section 2 prior to the amendment made it clear that the phrase "discriminate in price" did not cover discounts, allowances or rebates based on different quantities, and this phraseology was broad enough to indicate that allowances based on quantities were not deemed to be discriminatory, even though the quantities, and the allowances involved, were not necessarily a part of a standard quantity discount system. This proviso, insofar as pertinent, read as follows:

> "Provided, that nothing herein contained shall prevent discrimination in price ~~by~~ the purchasers of commodities on account of differences in the grade, quality or quantity of the commodities sold, or that makes only due allowances for differences in the cost of selling or transportation. * * * "

In lieu of that clause, the Robinson-Patman Act contains a double proviso which reads as follows:

> "Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers

sold or delivered: Provided, however, that the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established:"

Clearly, this double proviso clause makes no reference to standard quantity discount systems as such, but simply makes available to any vendor the right to show cost savings as a justification for differentials based on any quantities, standard, or non-standard. What it says, in effect, is that a vendor may sell an item for $10.00 to one customer and deliberately deny to a competing customer the right to buy that item for less than $20.00 if cost savings, based on quantity sales to the first customer, can be established. What it does not say (but what the Commission asserts it says) is that standard quantity discounts available on like terms to both of those customers are prohibited by the Robinson-Patman Act and require a defense of cost savings, or some other defense, to justify the use of such discounts.

But a proviso clause coupled to a prohibition clause is designed to do only one thing — to furnish a possible escape from the prohibition. Such a proviso has never been designed to describe or identify the thing prohibited. So in this case. Both Section 2 before the amendment and Section 2 (a) after the amendment prohibited (without further definition) discriminations in price. The sole difference is that under the former a price *which had first*

been proved to be discriminatory would escape the prohibition by a showing, *without more*, that it was a quantity price, whereas under the latter, the escape depended on a showing of a quantity price *plus* adequate cost savings. In either case, discrimination had to be proved independently and initially, for there can be no conceivable reason for a respondent to invoke an escape clause until first proved guilty.

This whole issue is further encumbered by the entirely irrelevant arguments under Point II of Petitioner's brief. First, the Commission charges the Court below (Pet. Br. p. 29) with having ruled that the Commission had the burden of proving cost savings. At great length the Commission argues that this cannot be true. Respondent admits it is not true and further admits that the question is not even in issue, all of which the Commission notes in its brief. So then Petitioner reluctantly concedes (Pet. Br. p. 33) that probably the Court below did not say this at all, but really held that to prove discrimination the Commission had to prove the absence of cost savings. The quotation in Petitioner's brief (pp. 33-34) from the lower Court's opinion indicates the inaccuracy of this conclusion. The Court made no mention of burden of proof. It only held that Respondent was not confronted with the necessities of the cost-savings proviso because the Commission had failed to prove either discrimination or injury.

The simple fact of the matter is that all arguments about the proviso clauses in this case are meaningless. The Commission has failed in its burden on discrimination. As a substitute (when all the talk of cost-savings burden is stripped away), the Commission is confronted with the bald necessity of arguing that all *differentials* are *discriminations*, that because Respondent's standard

quantity discounts involve differentials they *ipso facto* amount to discriminations, and that these flat statements, without more, constitute the discharge of a burden of proof. The law has not yet become that lenient regarding burdens of proof.

Large v. Small Buyer Argument.

Strewn through Points I and II of Petitioner's brief is the theme of the other argument aimed at the question of proof of discrimination. In substance, it is an attempt to attach the "large v. small buyer" stigma to Respondent's discount system. A few illustrations will suffice:

A. Under Point I of its brief, Petitioner has chosen to encrust this case with extended arguments of chain store domination based on Respondent's 50,000 case and $50,000 discounts (Pet. br. pp. 13, 14, 15, 16, 17, 20, 23, 25). Such an approach, of course, overlooks the fact that those two discounts are only parts of a general discount system, which also includes a carload discount, enjoyed in this case by all but 1/10 of 1% of all shipments of Blue Label (Resp. Ex. 17; R. 1466), and the 5,000 case discount, enjoyed by a large percentage of Respondent's customers everywhere. But the issue is not chain stores and the 50,000 case and $50,000 discounts. It is the right of Morton Salt Company to offer and pay all its customers, which include a few large chains, all items of its standard quantity discount pattern, of which the 50,000 case and $50,000 discounts represent only a part.

B. After noting with concern (Pet. Br. pp. 13, 14) the alleged unlawful effect of chain stores enjoying the larger discounts, Petitioner states:

"The record amply demonstrates that no one store

or single branch wholesaler could buy those quantities in a year."

First, the record demonstrates no such thing. It demonstrates that *some of the witnesses called by the Commission* either choose not to or feel they cannot buy those quantities of salt from *Morton Salt Company*. The record is silent as to how much salt those witnesses do buy or could buy from all salt producers, of which Morton is only one. Morton Salt Company is competing with all other salt producers for as much of the salt business of as many customers and potential customers as it can get, and a standard quantity discount system is a universally recognized method of accomplishing that very competitive result. Second, there is absolutely no evidence that one store or a single branch wholesaler could not or might not purchase from Respondent the quantities indicated. The ability of *all* wholesalers and retailers to purchase in quantities is not to be measured by the actual orders placed by a few witnesses with one company. Third, the quotation above attempts to place on Section 2(a) the construction that "purchasers" consist only of "one store" and "single branch wholesaler" units—as though the statute were concerned only with them and that, as a corollary, there is something nefarious in being a multiple unit retailer or wholesaler. But both the statute and Morton are concerned with purchasers, large and small, multiple or single, so it proves nothing for the Commission to couch its arguments in terms of "large chains" versus "single units".

This same theme of irrelevancy is further noted (Pet. Br. p. 25):

"In addition it is clear that the equal opportunity to purchase large quantities is largely fictitious. That

> is not only true generally, but was clearly the situation demonstrated by the record in the instant case. The evidence shows that the vast majority of respondent's customers were small concerns whose yearly purchases were limited to no more than a few hundred cases of salt (R. 198, 404, 416, 704, 782, 788, 811, 1055, 1064, 1082-83, 1105, 1116, 1231; Resp. Ex. 6; ***). Such purchasers do not possess the financial resources, storage facilities or the customers to enable them to purchase 50,000 cases or $50,000 worth of salt."

And then it is concluded (Pet. Br. p. 25):

> "Considering the thousands of wholesale and retail dealers in the United States, the 100 customers who received the 10 cents per case discount for 5,000 cases is very limited ***. An offer couched in terms which only a few can accept is clearly not as a practical matter equally available to all purchasers—and the Robinson-Patman Act was intended to deal with a practical problem."

But again, the record simply does not support any fragment of these sweeping assertions. What does Petitioner mean by the "vast majority" of Respondent's customers. Testimony of 13 witnesses is cited, but nowhere is there a line of evidence as to the total number of customers enjoyed by Respondent. So what is a majority, much less a vast majority, and how close is 13 to either? Moreover, these unfounded assertions touch the same fundamental problem noted above. These 13 witnesses only testified to what they had purchased from Morton alone. Not one couched his testimony in terms of *total capacity* to purchase salt, but only in terms of his actual purchases of Morton's salt. Once more let it be observed that the standard quantity discounts of Respondent, like those of any other merchandiser, are designed to tap the *total buying capacity* of a given wholesaler or retailer, and it

does not lie with the Commission lightly to toss aside that discount program because a most limited group of its own witnesses indicate that they have not taken advantage of those discounts, *particularly where their testimony stands devoid of any statements as to the capacity of their total salt purchases.* Finally, a comparison between the 100 five thousand case customers (which group, incidently, covers only the trade areas involved in this case) to "the thousands of wholesale and retail dealers in the United States" is something akin to comparing the number of cars in this country to the population of Canada. Section 2 as applied to Morton is concerned with "purchasers" of Morton's products. The record is silent as to the number of Morton "purchasers", and certainly there is no hint that it has "thousands" in the United States.

C. Lastly, the Commission is seeking to translate this case into an anticipatory trial of all general discount systems (not just Morton's) under Section 2 (Pet. Br. p. 13):

> "The contention is that the Act applies only to special discounts to favored customers, but not to general discount schedules *no matter how great the differentiation in price* paid between different groups of competing customers may be." (Italics ours.)

That is not the contention. Respondent is concerned only with its own general discount system and with its own related differentials. Respondent is not interested in nor is it seeking to defend any other discount system or any other set of differentials. It is not within the Commission's province, by academic transposition, to try in this proceeding anything but the Respondent and Respondent's own discount pattern.

That discount pattern is a simple one, and, contrary

to Petitioner's assertions, it favors the small buyer if it favors any one. In the case of the Blue Label, the price is $1.60. A discount of 10¢ is allowed if an order moves as a part of a carload shipment, so that any buyer, large or small, 50 cases or 10,000, can thus enjoy a 6¼% discount. But if an additional 10¢, or 6¼%, discount is desired, the buyer must purchase 5,000 cases. Thus, instead of increasing the rate or amount of discount proportionately with the greatly increased qualifying bracket, the additional discount has been maintained on the same percentage basis as the carload discount. This is even more drastic as to the 50,000 case buyer, who, though required to purchase 10 times that of the 5,000 case buyer, receives only an additional 5¢ or 3 1/8%. Almost this much is given by many companies in the form of a simple cash discount. The same is equally true of table brands other than Blue Label. Any shipment moving in a carload, large or small, enjoys the 5% carload discount, but to gain an additional 5%, a purchaser must buy at least $50,000 in table salt, and then he is accorded that extra discount only on items other than the Blue Label.

The conclusions are inescapable. By any factual test the discounts of Respondent are not discriminatory. They are equally available to all; the brackets, if anything, favor the small rather than the large buyer; and the pattern of those discounts is designed to reach (and must be tested by) the total salt buying capacity of wholesalers and retailers and not by what a limited few may have purchased from Morton over a selected period of years. But above

all, the burden of proving that Respondent's system is discriminatory lies with the Commission. This burden has not been discharged and Petitioner can derive no solace from any supposed specific prohibitions in the statute itself.

II.

There Are No Findings of Fact to Support the Commission's Order Insofar as Injury to Competition Is Concerned.

It is a well established principle of law that the Federal Trade Commission, like any other administrative agency or commission, is not empowered to issue an order unless the findings of fact warrant such an order: *Heuser* v. *Federal Trade Commission,* 4 F. (2d) 632, 634; *Philip Carey Mfg. Co.* v. *Federal Trade Commission,* 29 F. (2d) 49, 52; and Cf.; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 432, 55 S. Ct. 241, 253. The Commission in this case has run afoul of the edict of those decisions, in that no appropriate findings of injury or probable injury to competition can be found in support of the Modified Order to Cease and Desist; and no order can be sustained in the absence of such findings, even though it be decided that standard quantity discounts as such are deemed to be discriminatory in nature: See *A. E. Staley Mfg. Co.* v. *Federal Trade Commission,* 135 F. (2d) 453, 144 F. (2d) 221; *Samuel H. Moss, Inc.* v. *Federal Trade Commission,* 148 F. (2d) 378, cert. den. 66 S. Ct. 44.

Paragraphs One, Two, Three and Four of the Modified Findings of Fact (R. 2082-3) pertain only to jurisdictional facts and to general facts regarding the Respondent and the nature of Respondent's business. Save only for one isolated sentence in Paragraph Five, Paragraphs Five, Six and Seven (R. 2083-7) are devoted en-

tirely to findings, or purported findings, with respect to the nature of Respondent's discounts, to the condemnation of such discounts as being discriminatory, and to the assertion that competition existed, in general terms, between various customers of the Respondent, some of whom qualified for the discounts and others of whom did not. Paragraph Eight (R. 2087) contains five sentences presumably designed to appear as findings with respect to injury to competition, but the balance of that Paragraph is devoted simply to additional findings with respect to the alleged discriminatory nature of the discounts. Paragraph Nine (R. 2089) deals only with Respondent's cost evidence, and Paragraph Ten (R. 2089) merely contains a sweeping conclusion as to injury to competition, with the wording being more or less extracted from the Robinson-Patman Act itself.

So the findings as to injury, on which the Order depends, are all embraced in the following seven sentences:

(a) "Such rebate in many cases permitted such retail chain groceries to sell respondent's Blue Label salt to the consuming public at prices less than those at which wholesalers could reasonably sell said salt to their retail customers." (From Par. 5.)

(b) "'Consequently, the price at which the wholesaler offers his table salt is usually controlling, and a difference of five cents per case may result in the loss of a sale to a customer, not only of the salt involved but of other commodities as well, the order for which might be placed with the salt purchase.'" (From Par. 8.)

(c) "In some instances the discounts allowed by the respondent to some of its wholesale customers have enabled such wholesalers to offer respondent's table salt to retail dealers at prices equal to prices paid by competing wholesalers or at prices less than

competing wholesalers could reasonably sell said salt to the retailer customers." (From Par. 8.)

(d) "The Commission further finds that customers of the respondent who receive the benefit of the various discriminatory prices, discounts, rebates, and allowances * * * have a substantial advantage in selling respondent's salt in competition with other customers of the respondent who do not receive the benefit of such discriminatory prices, discounts, rebates, and allowances or who are obliged to pay respondent's full price for said salt." (From Par. 8.)

(e) "In order to sell respondent's table salt in competition with customers of the respondent who receive the benefit of respondent's discrimination in price, wholesalers who pay respondent's full price or who are denied the discounts or rebates allowed such favored customers must either sell at competitive prices and in so doing reduce their possible profits by the amount of the discriminations against them, or attempt to sell at higher prices than those which the favored customers of respondent charge for the same product, with the result of inability to secure business and a reduction in the volume of sales." (From Par. 8.)

(f) "Respondent, by selling its Blue Label salt to such large retail chain stores at prices below those charged for the same salt when sold to wholesalers, forces retailer customers of such wholesalers to pay prices which prohibit competition in price between such small retailers and the large retail chain stores." (From Par. 8.)

(g) "The Commission finds that the effect of the discriminations in price * * * may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory price is engaged and to injure, destroy, and prevent competition between those purchasers receiving the benefit of said discriminatory prices, discounts,

rebates, and allowances and those to whom they are denied." (From Par. 10.)

At a casual glance those "findings" may appear to be formidable. Any careful analysis, however, suggests that they are actually only so many words. To appreciate fully the completeness of this legal vacuum in the "findings of fact", some comparative reference must be had to the requirements of the Robinson-Patman Act itself, to the allegations in the complaint with respect to injury to competition, and to the provisions of the Order.

A. Findings Required By the Robinson-Patman Act.

The somewhat involved phraseology of the Act requires the Commission to find that the effect of any alleged discrimination:

1. "may be substantially to lessen competition * * * in any line of commerce", *or*
2. "may * * * tend to create a monopoly in any line of commerce", *or*
3. "May be * * * to injure, destroy, or prevent competition with any person who * * * grants * * * such discrimination", *or*
4. "may be * * * to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit of such discrimination", *or*
5. "may be * * * to injure, destroy, or prevent competition * * * with customers" of any person who grants the benefit of such discrimination, *or*
6. "may be * * * to injure, destroy, or prevent competition * * * with customers" of any person who knowingly receives the benefit of such discrimination.

Unless the Commission can and does find that some one or more of those "effects" exists, no cease and desist order can be sustained.

B. Relevant Allegations in the Complaint.

The allegations in the Complaint regarding the injurious effects of Respondent's alleged discriminations are all found in Paragraph Five (R. 4). Disentangled, the various allegations are that the effect:

> (a) "has been and may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory prices is engaged", *and*
>
> (b) "has been and may be * * * to injure, destroy and prevent competition between those purchasers receiving the benefit of said discriminatory prices and those to whom they are denied", *and*
>
> (c) "has been and may be to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in said line of commerce in the various localities or trade areas in the United States in which said favored customers and their competitors are engaged in business."

So the pattern becomes somewhat clear. Allegation (a) is designed to correspond to requirement No. 1 of the Act, but is restricted in its scope to purchasers; that is, there is no attempt to show a lessening of competition between the Respondent and its salt producing competitors. Allegation (b) is designed to correspond to requirement No. 5 of the Act. Allegation (c) is designed to correspond to requirement No. 2 of the Act, but like allegation (a) it is restricted in scope to purchasers.

Thus, three significant facts emerge. First, the Complaint charges no injuries under requirements Nos. 3, 4 and 6 of the Act. Second, the charges under requirements Nos. 1, 2 and 5 of the Act are limited to the effect between customers of the Morton Salt Company. Third, all three charges are linked together with the conjunctive

"and", thereby disclosing the Commission's original intent to prove all three charges—not just one of them.

C. Basic Provisions of the Modified Order.

The Order is brief (R. 2090-1) and contains only three basic prohibitions:

I. No variance in price between competing wholesalers. (Sub-paragraph (a) of the Order.)

II. No variance in price between competing retailers (Sub-paragraph (b) of the Order.)

III. No prices to retail customers of Respondent lower than those charged wholesale customers of Respondent, where the customers of the wholesaler compete with the retail customers of the Respondent. (Sub-paragraph (c) of the Order.)

Parts I and II of the Order could be supported by appropriate findings predicated on either allegations (a), (b) or (c) of the Complaint. But Part III of the Order simply has no counterpart in either the Complaint or the Robinson-Patman Act, so, as is more fully developed under section IV of the Argument in this Brief, all the findings in the world could not salvage that portion of the Order. It only remains, then, to determine whether or not the findings quoted above suffice to relate allegations (a), (b) or (c) to Parts I and II of the Order.

D. Findings of Fact.

The task of testing the sufficiency of these findings is made easier by certain initial eliminations:

First, there is no trace of a finding regarding monopoly. This at once indicates that allegation (c) of the Complaint was abandoned, and that Parts I and II of the Order must be supported, if at all, by findings related to allegations (a) and (b) of the Complaint.

Second, item (g) of the findings quoted above is a mere sweeping conclusion of law, couched in all the general vagaries of the Robinson-Patman Act. Such a conclusion of law does not become a fact even though the Commission calls it one: *Standard Oil of New York* v. *Federal Trade Commission*, 273 Fed. 478, 481. So item (g) of the findings must be disregarded.

Third, item (f) of the findings quoted above, if it finds anything, purports to be a factual finding in support of sub-paragraph (c) of the Order, and, for reasons already indicated, this item of the findings cannot be validly recognized.

Fourth, item (b) of the findings quoted above at most is only an academic statement of what might or might not be true in the merchandising of salt at the wholesale level. Clearly, it has no place as a finding of injury, because it contains no reference or allusion to Respondent's discounts, much less does it suggest that the granting of discounts is or might be the cause of the type of merchandising incident described in that item.

The analysis, then, narrows itself to a review of items (a), (c), (d) and (e) of the findings quoted above. All four findings have a significantly common characteristic: Each is in the past tense or purports to be a finding based on past events. None constitutes an attempt to find that there *may be* injurious effects in the future: Rather, the import of each is that there is evidence that injuries have already occurred. But if there were past events of injury, why the vague language? Why the reluctance of the Commission to name towns, customers, dates, quantities involved, amount of losses sustained, *et cetera*? Vagueness in findings of fact might conceivably be tolerated when referring to future possibilities, but such extremities of

vagueness vitiate those statements as "findings of fact" when, as here, they purport to refer to past events.

Finally, allegations (a) and (b) of the Complaint, and the corresponding provisions of the Robinson-Patman Act, require *quantitative* findings of injury. The key words in the Complaint and the Act are "substantially", "lessen", "injure", "destroy" and "prevent". But review item (a) of the findings! It refers to "many cases". How many were "many cases"? Were "many cases" substantial, did they lessen, did they injure, did they destroy, did they prevent? In item (c), reference is only made to "some instances". The very words themselves, vague as they are, suggest anything but substantial, lessening, injury, destruction or prevention. For quantitative measures, items (d) and (e) of the findings use the phrases "substantial advantage", "reduce their possible profits", and "reduction in the volume of sales". But again, are these phrases the factual and legal equivalents, without more, of the key quantitative words in the Act and the Complaint?

So much for laboring the "Findings of Facts". They are not findings of fact; they only dimly resemble the language of the Act and the Complaint; and they fall many legal miles short of supplying the appropriate and sufficient findings of fact necessary to the validity of the Order of the Commission in this case.

III.

The Evidence Does Not Support the Findings as to the Facts.

It is Respondent's position that the Commission's evidence was completely out of focus insofar as the provisions of the Robinson-Patman Act are concerned. Under that Act, the record must show that there was or probably might be

injury to competition *in any line of commerce*, or injury to competition *between customers of the Respondent*. Translated into terms of this case, "any line of commerce" means the wholesale grocery business and the retail grocery business, and competition between Respondent's customers means competition between wholesale grocers and between retail grocers who buy of the Respondent. But the Commission's theory of this case apparently is that the Act is concerned with competition *in a particular line of products of a particular vendor*, or competition *with respect to particular products of a particular vendor as it exists or might exist between customers of that vendor*.

In other words, according to the Commission, this Court is to understand that the sale of salt, shoestrings, brooms or sardines of a particular producer by a given wholesaler or retailer is a line of commerce. Little argument is needed to indicate that the Commission has chosen to confuse the act of merchandising particular items of particular producers by a wholesaler or retailer with the flow of business in the line of commerce in which that particular wholesaler or retailer finds himself. But the Robinson-Patman Act does not concern itself with particular businesses or with particular products. It concerns itself only with competition in lines of commerce and seeks only to prevent injury to lines of commerce. On the face of it, then, even if the evidence satisfies the Commission's theory of this case, it would not satisfy the requirements of the Robinson-Patman Act. As a matter of fact, the evidence does neither.

The number of individual dry grocery items handled by the average wholesaler or retailer ranges from 1,500 to 2,500, with a few houses or stores carrying as high as 4,000 to 6,000 items. Of these, only from 5 to 10 represent table salt items, and of those 5 and 10 table salt items, only a fraction represents products of the Respondent, so that

Respondent's products in practically all cases account for considerably less than ½ of 1% of the gross business of the wholesaler or retailer.[1] Hence, the record must show with at least a scintilla of microscopic exactitude that Respondent's standard quantity discounts, and its infrequent competitive adjustments, reaching as they do only a minute portion of the business of any wholesaler or retailer, stand accountable for some past or probable future injury to competition in the wholesale or retail grocery business in general, or for some past or probable future injury to the general competitive position of the grocery business of a given wholesaler or retailer.

Respondent's carload discount can at once be eliminated as an "injurious" factor. Save only for one instance of a re-shipment of a less than carload lot out of the New Orleans warehouse (R. 330), the record shows that every single witness enjoyed the carload discount (R. 1300-1302). Moreover, of the total table salt business of the Respondent for the entire country, including the trade areas covered by the evidence in this case, only 1/10 of 1% moved in less than carload lots (Resp. Ex. 17; R. 1466), and this fractional percentage is accounted for entirely by re-shipments, for the customer's convenience, out of metropolitan warehouses to destinations beyond the metropolitan areas served by the warehouses (R. 282-4).

Likewise, a further sweeping step can immediately be taken in discounting the Commission's case. Not a single discount customer, either wholesaler or retailer, employed that discount in fixing his regular resale price: Rather, in every instance the regular resale price was predicated on

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[1] R. 576-7, 593, 613, 752-3, 1025, 1514, 1725-6, 1739-40, 1760-1, 1782-3, 1805-6, 1819-1820, 1849, 1855, 1864, 1868, 1960, 2004, 2013, 2015, 2022.

the published list price at which the items were invoiced.[2] If this be true, and the fact stands uncontroverted on the record, then the presumed "injury" resulting from Respondent's discounts must have occurred by some insidious and not readily apparent means. And, having in mind that the Complaint in this case was filed on September 18, 1940, at which time Respondent's $50,000.00 discount had been in effect at least six years, its 5,000 case and 50,000 case discounts for at least twelve years, and its carload discount for even longer than that, it might at least be expected that some traces of this insidious means of injury would have come to light by the time this case reached trial.

That there was nothing to come to light is the story told by an analysis of Respondent's sales of table salt items. Respondent introduced in evidence Respondent's Exhibits Nos. 7(a) to 15(b) (R. 1409, 1420, 1422, 1423, 1424, 1425, 1426), and they show substantial increases in sales to *all* non-discount customers in *all* the trade areas for the entire period (January, 1, 1937 to December 31, 1941) covered by this case (R. 1404-1465). In short, competition was materially enhanced, not injured.

To secure the necessary detail in this analysis, Respondent's sales of the Blue Label to its various wholesale and retail customers in the trade areas involved were segregated from Respondent's sales of other standard table salt items to its customers in those same areas. Also, because the Commission had grouped its witnesses from various trade areas, some of the areas being state-wide in scope, others covering only portions of one or more states and still others being confined primarily to certain metro-

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[2] R. 582, 697-9, 807-8, 982-3, 1047-8, 1737, 1759, 1807, 1822, 1844, 1866, 1868, 1894, 1902, 1912, 1955, 1964, 1986, 1993, 2004, 2010, 2014, 2024, 2039-42, 2046, 2055.

politan areas, the Respondent detailed its exhibits in terms of those trade areas. As a still further step, the Respondent for each trade area also segregated the purchases of various classes of its customers, so that the tabulations show the separate trade area purchases of discount retailers, discount wholesalers (both of which classifications include retailers and wholesalers who received competitive adjustments, as well as those who received standard quantity discounts), non-discount wholesalers who testified for the Commission, other non-discount wholesalers, and non-discount retailers who testified for the Commission. The results of those tabulations, as exemplified in the detailed exhibits referred to, are summarized in Schedules I and II of the Appendix at the end of this brief.

The Schedules hardly need comment for they speak for themselves; yet, because of the importance of the factual data which they contain, at least some emphasis appears to be in order. It will be noted that purchases by the Respondent's customers for the year 1937 have been used as the 100% basis from which the percentages were developed for the succeeding years. In the City of New Orleans trade area, the Blue Label purchases by discount wholesalers steadily declined each year until 1941 purchases represented only 56.76% of those for 1937. Contrasted to that are the purchases of the non-discount wholesalers who testified for the Commission, which steadily increased to 111.04% in 1941, and at the same time the purchases of all other non-discount wholesalers in that same area increased to 142.99%. For the balance of Louisiana, Blue Label purchases of non-discount wholesalers testifying for the Commission increased to 116.73%, and those of all other non-discount wholesalers increased to 269.09%. The record is no different in the Georgia and Florida areas, where Blue Label purchases of discount retailers increased

to 131.91% while those of non-discount retailers who testified for the Commission increased to 194.28%. Simultaneously, the Blue Label purchases of non-discount wholesalers who testified for the Commission and those of other non-discount wholesalers increased respectively to 156.3% and 123.27%. The trade areas of North and South Carolina show no different results with respect to Blue Label purchases.

Schedule II, which reflects table salt items other than the Blue Label, is even more significant. In the first place, it is quite apparent that Respondent enjoyed in all the trade areas involved only a minute percentage of the salt business of discount retailers and discount wholesalers insofar as items other than the Blue Label were concerned. For example, in 1941, discount retailers in the City of New Orleans purchased a total of $52.10 of such items from the Respondent, and in the same area for the same year discount wholesalers purchased only $117.25 of such items. Referring again to the same year and the same type of items, discount retailers in the balance of Louisiana made purchases of $87.00 and discount wholesalers made purchases of $2,438.73. Again for the same year, discount retailers in the entire States of Georgia and Florida combined made purchases of only $5,903.80 of such items and discount wholesalers purchased only $1,211.93. Only in North and South Carolina does the Respondent appear to have had any respectable amount of business in 1941 with its discount retailers and discount wholesalers, with the former purchasing $15,065.20 of those items, while discount wholesalers purchased on the basis of $12,884.82. In the second place, Schedule II also establishes the fact that the percentage increase of purchases of table salt items other than the Blue Label by non-discount custom-

ers in more cases than not exceeded comparable purchases by discount customers in their respective trade areas. This was true in the City of New Orleans and in North Carolina and South Carolina as to both wholesalers and retailers. It was also true as to wholesalers in Georgia and Florida. Obviously, even had the $50,000 discount been reflected in the resale price of these salt items, which was not the fact, it would have affected only $37,760.83 of table salt business scattered over five states in 1941.

The conclusion is inescapable. The carload discount could not be an injurious factor, because everyone received it. None of the discounts was reflected in the regular resale prices of the discount customers, thus removing all such discounts as a direct factor of possible "injury", and the enhancement of the competitive position of the non-discount customers belies any suspicion that "injury" resulted from any insidious use of those discounts. Confronted thus with a record containing these factual certainties, while devoid of instances of injury or probable injury, the Commission has apparently predicated its entire case on the use of two hypothetical questions.

Commission's Hypothetical Question No. 1.

Most of the witnesses were asked approximately this typical question:[3] "If you were selling Morton's Blue Package salt at $1.65 per case, while at the same time a competitor of yours was selling it for $1.63 per case, would your business be affected?" A substantial number

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[3] R. 196, 208, 251, 276-7, 334, 340, 382-3, 390, 403-4, 416, 426, 433, 442, 449, 459, 483, 494, 506-514, 519, 529-534, 539, 566, 587, 600-601, 631, 644-7, 683, 701, 705, 717, 732, 745, 783, 791, 805, 811, 836, 860, 877, 894, 907, 927, 970, 981, 998, 1003-4, 1044-5, 1056, 1085, 1107, 1128, 1150, 1169, 1175, 1187, 1198, 1223, 1239, 1261-2, 1276.

of the witnesses answered "yes", while the rest answered "yes" or "perhaps", but with varying degrees of qualification. These questions and answers, all given over Respondent's continuing objection, were informative but not relevant. Any sane business man would readily admit that to some lesser or greater degree a competitor's price affects his business, but that is far from being proof that the competitive position of his wholesale or retail grocery business is being injured, or that the competitive tempo of the wholesale or retail grocery business in general is being injured, or that even the competitive table salt phase of any wholesale or retail grocery business is being injured, or, more important, that Respondent's discounts had anything to do with competitive resale price fluctuations, either real or hypothetical.

Actually, as the record shows, a wholesaler or retailer attempts only to "stay in line generally on all items";[4] and if he pays attention at all to his competitor's prices, he distinguishes, for example, between the effect of regular and special sale prices[5] and between prices of cash and carry houses or stores and those of regular service houses or stores.[6] So wholesale and retail prices never reach a stalemated level and never will for as long as each wholesaler or retailer, by price inducement or otherwise, seeks to gain business at the expense of his competitor. Thus, in New Orleans, one non-discount wholesaler (R. 179-189) listed Blue Label at $1.75 per case but on occasions sold as low as $1.55; another (R. 189-203) sold at $1.65 and occasionally at $1.60; another (R. 203-211) never

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[4] R. 449, 506-514, 578-9, 755, 1830, 1850, 1869, 1932, 1967-8, 2015, 2027.

[5] R. 554, 632, 683, 1729.

[6] R. 580, 757, 1842, 1962.

sold below $1.65 to retailers; and still another (R. 274-279) asked $1.70. Yet in New Orleans, the one lone discount wholesaler (R. 254-262) had an average price of $1.65. Again, New Orleans offers the same inconsistent price pattern in its retail stores. One chain store asks 9¢ per package in its small regular service stores and only 7¢ in its self-service super-marts operating in the samec ity R.2 12-223). A competing chain charges 7¢ in its super-mats, but only 2 for 15¢ in its regular stores in the same city (R. 283-304). This wholesale and retail price pattern is typical of that which the record shows existed in every other trade area.

Furthermore, Respondent had no monopoly on salt distribution in these trade areas. At least eight other producers were in the same market (R. 49), and there is every reason to believe that their efforts to secure business contributed heavily to the resale price disturbances on Respondent's products.[7] In fact, within the individual stores, salt items of competing producers are grouped together on the same shelves with every manner of discrepancy between their various sale prices.[8]

This hypothetical question, then, supplies the clue to a basic fallacy in the Commission's case. The Commission has confused "injury to competition" with normal business injuries necessarily resulting from the very existence of competition . The essence of competition is the process of one competitor "injuring" another competitor by taking business from him or preventing him from getting additional business. The Robinson-Patman Act seeks only to preserve that competitive situation, which, in effect,

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[7] R. 189, 945, 1108-1112, 1994.

[8] R. 1805-6, 1818, 1822, 1896-7, 1923, 1929, 1936.

perpetuates the constantly reciprocal process of one competitor "injuring" another. Therefore, the Commission cannot sustain its findings, as it has attempted to do in this case, by simply proving (a) the existence of discounts and (b) hypothetical (or real, too, for that matter) instances of one customer of the Respondent losing business to another of Respondent's customers because the latter had a lower resale price. Without more, those facts are mere merchandising coincidences and the "more" which must appear in the record, but doesn't, is an actual or probable causal relation between those two facts, with the causal effect being of sufficient intensity to injure, destroy or prevent the continued process of one competitor "injuring" another.

Commission's Hypothetical Question No. 2.

A substantial number of witnesses were asked this question or some question similar to it:[9] "If you were paying $1.50 per case for Morton's Blue Package while a competitor was paying $1.40, would your business be affected?" On occasions, the question took this variation: "If you and a competitor were both selling at $1.65, but your competitor was paying $1.40 while you were paying $1.50, would your business be affected?" Of the Commission's witnesses, 51 were thus interrogated. Thirty-two thought their business might be affected, although they did not specify how or to what extent. But 29 observed that, while the competitor enjoying the discount might have an

[9] R. 340-4, 346, 383, 390, 404, 416-23, 426-7, 433, 482, 494, 506-514, 519, 529-534, 540, 566, 579, 587, 595, 600-601, 643-4, 685, 701, 706, 717, 732, 745, 783-4, 794, 806, 812, 836, 860, 863, 876, 893, 894, 907, 927, 931, 970-2, 998-9, 1003, 1044-5, 1056, 1067, 1084-5, 1129, 1150, 1169, 1176, 1188, 1199, 1224, 1233, 1240, 1245, 1250, 1269, 1276.

opportunity to make more profit, there would be no effect if, as the record shows was true, the discount was not used to reduce the resale price.

Undoubtedly, the hoped for inferences to be drawn from these questions and answers were (a) that the discounts were reflected in the resale price, to the substantial competitive disadvantage of the non-discount customer, and (b) that the enjoyment of a discount insured a greater profit which in turn somehow worked to the substantial competitive disadvantage of the non-discount customer. But nothing in the evidence sustains or tends to sustain any such hopeful inferences, nor is the Commission thus permitted to prove its case by this type of "circumstantial evidence." The record flatly shows that discounts were not a regular pricing factor, and that, regardless of the discounts, the sales of non-discount customers increased. Moreover, both simple arithmetic and the record serve to extinguish any notion that the mere receipt of a discount guarantees to the recipient either a greater profit or a competitive advantage over a non-discount competitor. He who buys for $1.40 and prices at $1.75 will probably fare badly against he who buys for $1.50 and prices at $1.60 to gain volume. Again, the merchant who pays $1.40 and prices at $1.65 will probably fare badly in competition with the merchant who pays $1.50 and also prices at $1.65, if the former "displays" his salt in the far rear corner while the latter shows it next to the door. And so the examples can be multiplied. In a word, knowledge of of either costs or resale prices alone can furnish no hint as to comparative profits or competitive advantages—only a careful comparison of volume, turnover, overhead, administrative burden, warehousing and transportation costs, credit risks, display and advertising effort, and a multitude

of other merchandising factors can supply that answer.[10]

But aside from what these hypothetical questions and answers prove or fail to prove, there can be only one conceivable excuse for their use by the Commission—that the Robinson-Patman Act somehow guarantees equal profits as between all wholesalers and as between all retailers. But of course no such pretenses ever were or could be made of that Act. It can only be repeated: The Robinson-Patman Act is designed only to preserve competition, thus insuring, so far as possible, that each wholesaler will continue to "injure" other wholesalers and each retailer, other retailers by the time-honored device of taking business from them or keeping business away from them. Competitive resale price fluctuations, with the resulting certainty of unequal profit rewards, constitute the ingredients of the very competitive pattern sought to be preserved.

This is aptly illustrated in *Lipson* v. *Socony Vacuum Corporation*, 87 F. (2d) 265, 269, a triple-damage case predicated on alleged injuries suffered by plaintiff under the exclusive dealer contract system of the defendant. This contract was asserted to be in violation of Section 3 of the Clayton Act in that "competition is lessened between the plaintiff and other retailers." Under defendant's system, lower prices were allowed to tank car buyers, as contrasted to tank wagon buyers, but an exclusive dealer contract had to be executed to entitle the dealer to tank car deliveries and prices. A demurrer to the complaint was upheld for the following reasons:

"It is obvious from his declarations that the de-

[10] R. 1524-1530, 1736, 1762, 1804, 1820, 1824, 1827, 1848, 1867, 1892, 1903, 1908, 1915, 1925-8, 1930, 1940, 1948, 1952, 1961, 1999, 2004, 2010, 2014, 2016, 2023, 2025, 2048.

fendants' policy does not affect the amount of sales by the plaintiff of the defendants' products, but only his profits, since the inference is clear that he has supplied all demands of his customers for 'Socony' gasoline, though at a less profit than if he could buy on the tank car market. He does not allege, however, in his amended declaration, that he is equipped to accept gasoline at his filling station in tank cars, or that his profits are so small that he must give up supplying his customers with 'Socony' products. The inference is also clear that he buys and sells the products of other integrated or independent companies on the same terms as those of the defendants. There is obviously no discrimination in terms or price between him and other retail customers of the defendants."

So the Commission has proved, at least hypothetically, that the resale prices on Respondent's products vary, that sales are won and lost because of it, and that there is no fixed profit standard between wholesalers and between retailers; and in the very process of making that proof, as supplemented by Respondent's proof of constantly increased sales by non-discount customers, the Commission has established beyond any question of doubt, not injury to competition, but the rigorous maintenance and enhancement of competition. At no juncture in the record is there a trace of proof that Respondent's discounts lessened this competition, substantially or otherwise, in the wholesale or retail business in any trade area involved in these proceedings, or that competition between any two or more wholesalers or any two or more retailers was in any degree injured, much less prevented or destroyed.

The applicable law is clear. Section 11 of the Clayton Act provides that "The findings of the Commission * * * as to the facts, *if supported by testimony*, shall be con-

clusive". (Italics ours). Translated, this means what this Court said in *National Labor R. Board* v. *Columbian E. & Stamping Co.*, 306 U. S. 292, 299, 59 S. Ct. 501, 505:

> "'Section 10(e) of the Act provides: '* * *. The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such revelant evidence as a reasonable mind might accept as adequate to support a conclusion,' * * * and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

This same criteria has been announced time and again in other decisions: *Consolidated Edison Co.* v. *National Labor R. Board*, 305 U. S. 197, 299, 59 S. Ct. 206, 216; *B. S. Pearsall Butter Co. v. Federal Trade Commission*, 292 Fed. 720, 723; *Carlay Co.* v. *Federal Trade Commission*, 153 F. (2d) 493, 496. Even more specifically, the courts have held that the evidence must disclose something considerably more than the mere possibility of injury: *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356, 42 S. Ct. 360, 362; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 298, 50 S. Ct. 89, 91; *Standard Oil Co.* v. *Federal Trade Commission*, 282 Fed. 81, 86, aff'd 261 U. S. 463, 43 S. Ct. 450. And if competition still flourishes or increases after the acts complained of have been completed, then this evidence rule is even more vigorously enforced: *Pennsyl-*

vania R. Co. v. *Interstate Commerce Commission,* 66 F. (2d) 37, 38, 39, aff'd 291 U. S. 651, 54 S. Ct. 559; *Pick Mfg. Co.* v. *General Motors Corp.,* 80 F. (2d) 641, 644, aff'd 299 U. S. 3, 57 S. Ct. 1; *Standard Oil of N. Y.* v. *Federal Trade Commission,* 273 Fed. 478, 482.

To all of this the Petitioner (Point III of its brief) advances arguments that have some rather quaint legal aspects:

1. Petitioner admits it has the burden of proving injury or potential injury to competition. (Pet. Br. pp. 36, 37, 38). (This, of course, is clear from Section 2(a).)

2. Next Petitioner asserts that it "may draw reasonable inferences of fact, such as a reasonable man would draw, from facts which are proved or conceded" (Pet. Br. p. 37). (As a general proposition, Respondent has no quarrel with this.)

3. Then Petitioner concludes that its burden of proof is discharged if it introduces evidence showing "(1) that a company sells at different prices, (2) to customers who are in competition with each other, plus a factual inference by the Commission, based on these two facts, that the competition of the purchasers who must pay the higher price will probably be injured" (Pet. Br. p. 38). (This supposedly constitutes "substantial evidence" of potential injury to competition.)

4. And finally Petitioner discloses its reason for this bit of logic — the Commission is most desirous of avoiding lengthy trials, thereby saving expense and time in enforcing the Robinson-Patman Act (Pet. Br. pp. 39, 40). (In short, show discounts, show

competitors, show "inferences", then jail the culprit. It saves time and money.)

There are, of course, two obvious answers. First, the courts in all the cases cited above have repeatedly told administrative tribunals that this cannot be done. Second, the Commission knows it cannot be done. As evidence of the Commission's insincerity, it should be noted that it still held extended hearings and took several thousand pages of testimony although Respondent admitted in its answer (R. 7) that it allowed quantity discounts to any customers who qualified; and, furthermore, despite the argument thus being urged on this Court, the Petitioner still deems it essential on the question of injury to competition to devote 27 pages of its brief (pp. 45-72) to a detailed analysis of the evidence in the record. So a review of this evidence is necessitated, but it should rather quickly become apparent that the Commission may have wistfully advanced the foregoing argument because of the complete inadequacy of its evidence on the question of injury.

The Petitioner's citations from the record fall into three classifications: A. So-called inferences from answers to the question, "Are you hurt if your competitor undersells you?" B. So-called inferences from answers to the question, "Are you hurt if your competitor purchases for less than you do?" C. So-called examples of "actual" injuries allegedly attributable directly to Respondent's discount system.

A. The record shows that salt is a competitive product (Pet. Br. p. 46); that prices charged by competitors are important (Pet. Br. p. 46); that if a competitor sold at a lower price, it would have to be met or business would be lost (Pet. Br. p. 46); that if a competitor sold salt at

slightly lower prices than those of the witness, even 2¢ or 5¢ lower, the latter's business would be adversely affected (Pet. Br. p. 47); that you have to meet a competitor's price on salt (Pet. Br. pp. 47, 48); that if A & P sold for ½¢ less, the price must be met to avoid losing business (Pet. Br. p. 48); and that if a dealer is out of line on salt prices, particularly the Blue Label, business in general is hurt (Pet. Br. pp. 49, 50, 51).

Presumably, the inference to be drawn is that Respondent's discounts are responsible for these merchandising problems. But there is quite obviously a number of things wrong with such an inference. In the first place, if Respondent's discounts are charged with the responsibility for producing resale price discrepancies in the wholesale and retail trade, then the corrolary of the inference must be that, in the absence of any quantity discounts on Respondent's products, there would be no price discrepancies of any kind or description in any wholesale or retail marketing area. It is a "reasonable inference" that this simply is not true. It is also a "reasonable inference" that if it were true, some group of wholesalers or some group of retailers would stand charged with violations under the Anti-Trust Acts. It is a matter of common experience and knowledge that the very existence of competition at the wholesale or the retail level produces resale price discrepancies. Therefore, even though this type of testimony be regarded as circumstantial evidence, the inference to be drawn is that competition in the wholesale grocery line of commerce and in the retail grocery line of commerce existed throughout the period covered by this case, and that the existence of Respondent's standard quantity discounts on certain of its brands of salt in no way injured or adversely affected those lines of commerce.

B. The record also shows that the cost of salt is a factor, but not the only one, in establishing the resale price (Pet. Br. p. 46); that some witnesses believed their business would be adversely affected if competitors purchased more cheaply than they did (Pet. Br. pp. 52, 53); that other witnesses believed this to be true only if the discount was reflected in the resale price (Pet. Br. pp. 53, 54); and that others felt a discount customer could undersell, even though he did not, and thus acquire a whip-hand over the market (Pet. Br. pp. 56, 57). The inference which the Commission would obviously like this Court to draw is that such testimony amounts to proof of potential injury to competition, but the record precludes any such inference.[11] Petitioner has simply filled

[11] Unfortunately for the length of this brief, only a commentary as to each witness cited by the Commission in its brief will adequately show how utterly contrary to the facts this inference is. (For convenience reference is made to the record citations in Petitioner's brief rather than to the names of the witnesses or their companies, and only abbreviated statements will be employed.)

R. 340, 341, 343: No testimony as to losses; sales increased 1937-1941 (Resp. Ex. 7a, 8a; R. 1409); C. D. Kenny Co., sole discount wholesaler in area, out of business in 1941, but witness still active (R. 337).

R. 404: Charges $1.70 delivered and $1.60 cash and carry for Blue Label (R. 403), and, being a non-discount customer, discounts could have had no bearing on this price spread; total salt sales have increased (R. 408).

R. 420, 423: Non-discount customer, but Blue Label sales increased (R. 416); delivered price of $1.80, but occasional cuts to $1.58 to meet cash and carry competition (R. 417); obviously no relation between discounts and $1.58.

R. 426, 427: Merely the testimony of the office manager (R. 428); non-discount customer, but Blue Label sales increased 1937-1941 (Resp. Ex. 11b; R. 1423).

R. 482: No injury if lower purchase price not reflected in resale price.

the record with a miscellaneous lot of guesses and answers to several variations of a hypothetical question, some of which variations were based on the facts but many of which had not the slightest resemblance to the facts. But aside from all such conjecture, the acid test is what actually happened. As indicated in detail in footnote No. 11, the "evidence" relied on by the Commission on this score is completely overshadowed by everyday merchandising sense: Discounts were not reflected in resale prices; the resale prices, not the purchase prices of a competitor, are all that interests most merchandisers, and some are even indifferent to resale prices; resale prices have some relation to cost, but the many variations in resale prices are attributable to a host of merchandising factors utter-

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[11] (Continued)

R. 506; 509; 513: Blue Label sales increased 1937-1941 (Resp. Ex. 11a; R. 1423).

R. 519, 520; 5,000 case buyer (R. 516): competes with A & P, a 50,000 case buyer (R. 515) but Blue Label sales increased 1937-1941 (Resp. Ex. 11a; R. 1409).

R. 529: No testimony of loss of business.

R. 540: Lower purchase price of competitor does not injure if not reflected in resale price; no evidence of reflection in resale price.

R. 579, 580, 583: Receives 10¢ discount but resale price would be same with or without discount (R. 582); varying resale prices offered to trade are determined by delivery haul, not the discounts (R. 578).

R. 588, 595, 596: No injury if discount not reflected in resale price; no evidence it has been.

R. 603, 604, 610, 613: A non-discount customer with resale price of $1.55 (R. 601), which is lowest price testified to in Jacksonville market by either discount or non-discount buyers; business has grown over period of years (R. 608).

R. 644: A non-discount customer, and the only other one in Jacksonville market having a resale price of $1.55 (R. 641): Blue Label sales constantly increased 1937-1941 (Resp. Ex. 11a; R. 1409).

R. 685: Non-discount customer using Blue Label constantly as a "leader" at $1.58 (R. 682); if discount not re-

ly apart from cost; and some discount buyers, with all their "advantage", are forced out of business, while non-discount buyers, with all their "disadvantage" consistently show sales increases.

C. Finally, there are the Petitioner's examples of "actual" injury (Pet. Br. pp. 60-70) — twenty in all, plus a few unnumbered commentaries added for extra measure. They merit individual treatment for reasons which will readily become apparent. (The numbers used correspond with those in Petitioner's brief.)

(1) Respondent's president stated that generally differentials are reflected in retail prices (R.55).

But Petitioner failed to disclose that this statement

11 (Continued)

flected in resale price, no injury (R. 685); Blue Label sales increased 1937-1941 (Resp. Ex. 11b; R. 1409).

R. 706: Blue Label sales increased 1937-1941 (Resp. Ex. 11b; R. 1409).

R. 717: Substantial increase in Blue Label sales 1937-1941 (Resp. Ex. 11a; R. 1409).

R. 732: Chain store operation—sells Blue Label at 7¢ in super-markets and 9¢ in conventional stores (R. 726), the price discrepancies by the same concern obviously being predicated on something other than discounts.

R. 755: Blue Label sales increased 1937-1941 (Resp. Ex. 11a; R. 1409).

R. 783, 784: Non-discount customer with no evidence of losses; sales increased (R. 785).

R. 794, 795: Blue Label sales increased (R. 788); non-discount customer having $1.60 cash and carry price and $1.65 delivered price, so price spread has no relation to discounts.

R. 806: Witness was manager of Kroger branch in Atlanta; Kroger receives 15¢ discount on Blue Label; witness did not know it (R. 803), but still suggested adverse effect of a competitor buying at $1.35 instead of $1.50, thus illustrating the utter lack of probative value in answers elicited by Commission's hypothetical questions; retail price was 8¢ but dropped to 7¢ in super-

was made with respect to price differences between three pound square cartons under the Triangle or Rock Crystal brands, and three pound pockets (cotton bags) under the Star or Triangle brands. So, he was talking of different brands, different packages and different plant prices, all of which had literally nothing to do with standard quantity discounts.

(2) and (3). One wholesaler in New Orleans had to reduce his regular $1.70 price to $1.55 to accommodate a retail customer meeting A & P store competition (R. 182, 183). Another wholesaler in the same city had to reduce his regular $1.65 to $1.60 to help one of his retail customers meet the same A & P competition. The A & P price was 7¢ a package or $1.68 a case (R. 192, 193).

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[11] (Continued)

markets when they were opened (R. 804), a resale price adjustment by a maximum discount customer obviously having no connection with the discount.

R. 812, 813: Received no discount; C. D. Kenny Co., a discount competitor, finally went out of business (R. 809); resale prices range from $1.59½ to $1.70, depending on cash and carry or delivery (R. 811).

R. 836, 837: Discount chain; 8¢ resale price in supermarkets and 9¢ in regular stores (R. 835).

R. 863: No injury if discount not reflected in resale price.

R. 875, 876: Blue Label business increased 1937-1941 (Resp. Ex. 13b; R. 1425).

R. 904, 905, 907, 914: Sales increased and no evidence of losses (R. 911).

R. 970: No evidence of loss of business (R. 974, 975).

R. 1045: C. D. Kenny Co., a discount customer, sells at $1.70-$1.75 (R. 1036) regardless of the discount; notwithstanding the discount, sales increased from 1937 to 1938, then declined to 1941 (Resp. Ex. 13a; R. 1425).

R. 1056: Non-discount customer; sales increased 1937-1941 (Resp. Ex. 13a; R. 1425).

R. 1067: Non-discount customer; sales increased 1937-1941 (Resp. Ex. 13a; R. 1425).

R. 1084, 1085: Has been in business only a year (R. 1082).

R. 1150: No injury if discount not reflected in resale price.

These are remarkable examples. How is it that two competing *non-discount* customers have price discrepancies of $1.70 v. $1.65. This Court is to believe that only Respondent's discounts could produce that result. Again, why must one retail customer get a $1.55 price and the other only a $1.60 price to meet the same competition. Perhaps, after all, there are factors other than net cost which enter into meeting competition. But the record tells even more. The $1.70 wholesaler had only "one particular customer" who needed this price adjustment; and the $1.65 wholesaler had only an occasional customer who needed help. Apparently Respondent's discounts did not injure the remaining retail customers of these two

[11] (Continued)

R. 1170: Chain store; sells at 7½¢ in super-markets and 9¢ in regular stores (R. 1163), a price discrepancy not related to discounts.

R. 1188, 1189: Witness is manager of a C. D. Kenny Co. branch, about which some witnesses complained, but he testified he tried to get $1.70 while competitors continued to sell at $1.60 (R. 1186); no injury as discount not reflected in resale price.

R. 1199: Competitors all have about same price so no injury if one buys cheaper (R. 1200).

R. 1224: No injury if discount not reflected in resale price; resale price, not purchase price, is the factor in competition (R. 1228).

R. 1233: No injury if resale price does not reflect discount; non-discount customer, but sales increased 1937-1941 (Resp. Ex. 13a; R. 1425); and this even though witness worked on fixed percentage mark-up and did not meet competitive prices (R. 1234).

R. 1241, 1245, 1251: Primarily buys from Diamond Crystal Salt Co. (R. 1239); resale price and not purchase price of competitor is all that is important (R. 1250, 1251).

R. 1262: Slight increase in sales 1937-1941 (Resp. Ex. 14b; R. 1425).

R. 1270: No injury if resale price does not reflect discount.

wholesalers. Or it could be that these two or three retailers were shrewd buyers, particularly in view of the fact that A & P sold at 7¢ ($1.68 per case) only in its self-service super-markets, but at 9¢ ($2.16 per case) in its regular service stores (R. 1783).

(4) A non-discount wholesaler in Tampa has to sell at $1.58 to meet the competition of two competitors, one a discount and the other a non-discount customer of Respondent (R. 417, 441).

The witness himself gives the clue to this "injury". He is a service wholesaler — delivery, credit, etc. The competitors are cash and carry. Morton's discounts do not enter the picture.

(5) A wholesaler's business was affected before he received a discount, but it was not affected thereafter (R. 494). But to qualify for the 5,000 case discount, he sometimes cut the price to $1.48 (R. 497, 498).

The witness first qualified for a discount in 1942 (R. 491). Prior to that, his business was "affected" as follows (Resp. Ex. 11a; R. 1423): Purchases of Blue Label in 1937 — $2,887.50; in 1938 — $3,915.00; in 1939 — $3,112.50; in 1940 — $2,475.00; and in 1941 — $4,474.50. As for sales at $1.48 — how often, how many cases, to how many customers, and what competitor lost Blue Label business as a result. Or did

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[11] (Continued)

R. 1276, 1277: No injury if resale price not based on discount.

R. 1769: No injury if discount not passed on.

R. 1853: Purchase price of any particular item not important as the prices paid for all items tend to compensate as between competitors.

R. 1874: Purchase price of competitor immaterial.

R. 2066: $1.50, not $1.40 net discount basis, is used in determining 10% mark-up for resale (R. 2055, 2056).

these occasional prices invade the sale of other brands? The record is silent. But this purports to be proof of actual injury.

(6) A non-discount Jacksonville wholesaler sells, against his will, for $1.55 because competitors are selling at that price (R.613). He competes with Thomas & Howard Co., a discount wholesaler.

Of course Petitioner wishes this Court to conclude that because Thomas & Howard Co. receives a discount, it sells at $1.55, so this witness is injured. The facts are that the witness operated a cash and carry house (R. 599, 600). The only competition he was meeting at $1.55 was Setzer's, also a cash and carry and also a non-discount wholesaler (R. 614, 641). There is no evidence in the record that Thomas & Howard Co., or any other wholesaler, sold as low as $1.55 in witness' market.

(7) A non-discount wholesaler in Macon says he quoted $1.55 but lost the business to C. D. Kenny Co., a discount wholesaler, at $1.50 (R. 684, 685).

Was this an injury from Morton's discount or a clever retailer at work. The whole story is that the retailer called the witness, who quoted $1.55 rather than his regular price of $1.58, because he knew the retailer was "a close buyer" (R. 684). And when the retailer said he could get Blue Label from C. D. Kenny Co. at $1.50, the witness "was rather surprised, because usually this house did not sell goods at cost" (R. 685). Moreover, the witness only knew he lost the business: He did not know whether C. D. Kenny Co. got it (R. 685). Actually, according to the Macon manager of C. D. Kenny Co., his price is $1.70 unless competition forces him down to $1.60, or, in

the case of cash and carry houses, to $1.58 or $1.55 (R. 696).

(8) A non-discount retailer checked competitors' prices, including two discount chains, A & P and Colonial Stores (R. 719, 726, 727), so as not to be undersold.

Probably they checked the witness' prices too, and for the same reason.

(9) An Atlanta wholesaler cannot meet $1.53 price of Quality Service Stores, which is a member of N R O G, a 10¢ discount customer (R. 755, 746, 747).

Although Respondent has several discount customers in Atlanta, witness, for undisclosed reasons, was intent only on Quality Service Stores, which operates on a non-profit cooperative basis for its retail members and sells only to its members (R. 1992). At first the witness was sure the price was $1.53, then he wasn't sure (R. 756). The actual price was $1.55 (R. 1991). Meanwhile, witness' Blue Label sales increased from 1937 to 1941 (Resp. Ex. 11a; R. 1423).

(10) An Atlanta wholesaler lost business to C. D. Kenny Co., a discount wholesaler (R. 817, 818).

This is how it happened (R. 817):

"By Mr. McBride:

"Q. Then, will you describe how you know you lost business to C. D. Kenny Co.?

"A. Our business had a general increase of at least 25 per cent, and I take it that the salt should have increased on the same proportion, and since it didn't increase, that means that we have lost that business for that reason."

Significantly, C. D. Kenny Co. gave up business in Atlanta a year before this witness testified (R. 809).

(11), (12), (17), (18), (19), (20) These witnesses gave voice to a common complaint (R. 870, 871, 884, 919, 922, 923, 954, 956, 1149, 1219, 1222, 1223, 1237, 1239, 1275): We could not meet Thomas & Howard Co. and C. D. Kenny Co., both discount buyers of Blue Label, until we got discounts. These we received by buying through other wholesalers, so as to get a price of $1.40 or $1.42. Then we could meet competition.

The desired inference is clear, but if the inference is valid it should be expected that the purchases of Blue Label by these witnesses would show a marked upturn immediately after entering into the discount arrangement. Almost the exact opposite was true: Nos. (11), (12) and (17) started their discount arrangement in early 1940 (R. 869, 919, 1144), No. (18) in late 1938 (R. 1222), and Nos. (19) and (20) in late 1939 (R. 1237, 1273). Purchases were as follows (Resp. Ex. 13a, b, c; R. 1425):

	1937	1938	1939	1940	1941
(11)	$ 120.00	$ 142.50	$ 352.50	$ 262.50	$ 375.00
(12)	270.00	315.00	300.00	480.00	180.00
(17)	1,187.50	3,705.00	1,921.50	2,032.50	2,190.00
(18)	1,270.00	825.00	1,170.00	787.50	825.00
(19)	212.50	262.50	225.00	300.00	300.00
(20)	660.00	375.00	600.00	600.00	600.00

The figures speak for themselves. Perhaps the witnesses were plagued with better merchandising methods and not quantity discounts.

(13) It was reported that Thomas & Howard was offering lower prices (R. 1060, 1061).

Why this statement is cited as evidence of anything is puzzling.

(14) Thomas & Howard was selling below $1.65 (R. 1071, 1072, 1088), and in one case had sold at $1.50 (R. 1076, 1095, 1096, 1097), thus depriving the witness of business.

Why $1.65 is the sacred minimum is not clear. The record is replete with instances of non-discount wholesalers voluntarily selling well under that figure. In any event, one of the witnesses had enjoyed a steady increase in Blue Label sales from 1937 to 1941, while the other witness had not purchased Blue Label until 1941 (Resp. Ex. 13a; R. 1425).

(15) By letter a customer asked to receive the discount accorded C. D. Kenny Co., but was advised this could not be done. (R. 1093).

This does not prove injury. It only proves that Morton did not deviate from its discount pattern.

(16) A witness lost salt business to Thomas & Howard Co. and C. D. Kenny Co. on account of lower prices (R. 1106, 1109).

This is indeed a fitting climax. The witness actually testified that he lost no business on the Blue Label (R. 1106), that the business lost was on square packages (R. 1106), that he bought from four producers besides Morton (R. 1108), and that he was handling the salt of these other producers when the losses occurred.

The argument and analysis on this point has been lengthy, and possibly tedious, but it can lead to only one conclusion: The Commission did not prove actual or potential injury to competition.

IV.

The Modified Order to Cease and Desist Exceeds the Jurisdiction of the Commission.

Perhaps the best evidence of the validity of this assertion is found in a letter from the Federal Trade Commission, dated January 31, 1945, addressed to the Clerk of the Court below and now constituting a part of the files of that Court. In it the Commission candidly admitted that its original order to cease and desist was "too broad", and requested that Court to enter an order remanding the cause, pursuant to stipulation of counsel, for the purpose of modifying that order to cease and desist. This request was granted and in due course a Modified Order to Cease and Desist, which is now the subject of this appeal, was issued by the Commission.

But a comparison of the original order with the Modified Order immediately suggests that if the original order was beyond the Commission's jurisdiction, the Modified Order is doubly so. For the convenience of the Court sub-paragraphs (a), (b) and (c) of the two orders are quoted in full, with the language which is not common to both orders being italicized (R. 2079 and 2090):

> (a) "By selling *any of* such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; *provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.*
>
> (b) By selling *any of* such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; *provided,*

however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

(c) By selling *any of* such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer."

The words "any of" which appear in all three paragraphs were in the original order but omitted from the Modified Order. The *proviso* clauses which appear in paragraphs (a) and (b) were not present in the original order but were added in the Modified Order. In all other respects, the orders were identical.

There was good reason for the Commission's discomfiture and for its voluntary vacillation.

A. The Modified Order, disregarding the specific allegations of violations in the Complaint and the specific findings of violations in the Modified Findings As to the Facts, enjoins any and all violations of the Robinson-Patman Act, past, present and future, and either actual, potential or possible.

The Commission in the Complaint describes in paragraph Four (R. 3) the substantive basis for having filed the Complaint in the first instance. In effect, the Commission alleges that the Respondent

> "has been and is now discriminating in price between different purchasers buying such products of like grade and quality by selling its products to some of its customers at lower prices than it sells its products of like grade and quality to other of its customers who are competitively engaged one with the other in the sale of said products".

This is immediately followed by the sentence which ties that general allegation to the specific and detailed alle-

gations regarding the standard quantity discount system of the Respondent:

> "The said discriminations in price are brought about by the following practices and policy pursued by the Respondent, to-wit:"

The Complaint contains no other allegations regarding the nature of the alleged violations by the Respondent of the Robinson-Patman Act, so that quite obviously the Complaint is predicated upon, and only upon, the employment by Respondent of its standard quantity discount system as a part of its sales policy.

In this same issue, the Modified Findings of Facts are likewise limited to findings with respect to the existence and alleged effect of that standard quantity discount system. Paragraph Five (R. 2083) purports to find that the Respondent

> "has been, and is now, discriminating in price between different purchasers buying such products of like grade and quality by selling its products to some of its customers at lower prices than it sells its products of like grade and quality to other of its customers who are competitively engaged with the former in the sale of such products".

Then follows the tying sentence similar to that found in Paragraph Four of the Complaint: "Among the general practices pursued by the respondent in discriminating in price are the following:" This sentence is followed by a series of sub-paragraphs devoted entirely to the standard quantity discount system of the Respondent insofar as Morton's Blue Label quantity discounts are concerned. Paragraph Six (R. 2086), after a prefatory general finding, is completely devoted to that phase of the standard quantity discount system of the Respondent having

to do with carload discounts and the $50,000.00 discount. Paragraph Seven (R. 2086) has reference to the competitive allowances granted Consolidated Companies, Inc. and Thomas & Howard Companies.

Contrasted to these specific allegations and findings is the Modified Order in which not the slightest reference is made to any of those specific allegations or findings. On the contrary, paragraphs (a), (b) and (c), except for the *proviso* clauses, contain sweeping injunctions against the Respondent, which, in substance, prohibit the Respondent from ever selling any products to any customers at prices different in any degree from prices charged other customers competing with the first group. In short, Respondent is required to conduct its business from now on at its peril, leaving to the Commission the arbitrary and dictatorial option of determining when and whether or not that Modified Order has in the slightest manner been violated, with the test to be quasi-criminal contempt proceedings for so long as the Morton Salt Company remains in business. By such a device the Commission quite obviously would be able to escape the requirements of the Clayton Act and of normal administrative and judicial proceedings in that it would not have to investigate and prove, if it could, by normal legal procedures the existence of such future violations.

Any number of courts, including this Court on several occasions, have flatly denied this sweeping dictatorial power to the Commission and to like government agencies. In the case of *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, 435, 61 S. Ct. 693, 699, 700, this Court made the following comment in eliminating such injunctive language from a cease and desist order entered by the National Labor Relations Board:

"But the mere fact that a court has found that a

defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

"• • •

"We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found."

The same theory was followed in the case of *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. (2d) 478, 483. Comparable judicial language is also found in the following cases: *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427, 40 S. Ct. 574; *Salt Producers' Ass'n* v. *Federal Trade Commission*, 134 F. (2d) 354, 360; *Allen B. Wrisley Co.* v. *Federal Trade Commission*, 113 F. (2d) 437, 442; *Swift & Co.* v. *United States*, 196 U. S. 375, 25 S. Ct. 276, 281; *Raymond Bros-Clark Co.* v. *Federal Trade Commission*, 280 Fed. 529.

B. The order exceeds the authority granted the Commission under the Robinson-Patman Act.

The order utterly fails to confine itself to the jurisdiction granted the Federal Trade Commission under the Clayton Act. Section 2 (a) of the Act prohibits the employment of discriminatory prices, but Section 2 (a) also provides that discriminatory prices are not violative of the Act if, in substance, (a) no injury to competition results, (b) cost differentials justify the price differentials, or (c) there exists changing marketing conditions which may require seasonal or distress or similar types

of sales. In addition, Section 2 (b) of the Clayton Act makes quite clear that a vendor has the right to meet competitive conditions by price adjustments. In contrast, sub-paragraphs (a), (b) and (c) of the Modified Order, except for the *proviso* clauses, enjoin price differences unless, as indicated by the preface to those sub-paragraphs, cost differentials can be established. Obviously the Commission is without authority thus to rewrite the Robinson-Patman Act.

Likewise, the *proviso* clauses in paragrap[illegible] and (b) are peculiarly vulnerable to this same condemnation. Those *proviso* clauses, in substance say that the Respondent may use

> "price differences of less than five cents per case *which do not tend to lessen, injure, or destroy competition.*"

In the first place, the Robinson-Patman Act makes it quite clear that any person can employ any price differentials he chooses if competition is not injured. The Respondent, then, is completely puzzled as to where the Commission finds its authority to tell Respondent that it can have differentials up to five cents if competition is not injured. The Commission must either find and rule that a given differential injures competition, and then prohibit it, or it must leave that differential entirely alone. It is not permitted to place any ceiling on differentials which do not injure competition.

More than that, the only conceivable authority under which the Commission could possibly add such *provisos* to an order is found under the second *proviso* clause of Section 2 (a) of the Clayton Act. But that *proviso* requires the Commission to do a number of things before

it can affirmatively interfere (as contrasted to negative interference under a cease and desist order) with a company's discount system. The Commission must duly investigate; it must hold hearings on the point; it must find that available purchasers in greater quantities are so few in number as to render differentials on account thereof unjustly discriminatory or promotive of monopoly; and it must then fix and establish quantity limits. The Commission obviously has had an investigation and a hearing and has made some findings, for negative cease and desist order purposes, with respect to Respondent's standard quantity discount system. But it has made no investigation; it has held no hearings; it has gathered no evidence; and it has made no findings with respect to any affirmative adjustment of those quantity discounts on the basis of "less than five cents" or otherwise.

Moreover, the "less than five cents per case" of the *provisos* found in sub-paragraphs (a) and (b) of the Modified Order are not even related to a given quantity or quantities, so that should the Respondent attempt to invoke the proviso clauses, it could very readily be entrapped by contempt proceedings if the Commission chose to disagree with Respondent as to the appropriately related quantities on which this less than five cents per case discount could be granted. This is clearly illustrated by this very case. In one breath the Commission prohibits the 50,000 case discount of 15¢, which exceeds the 5,000 case discount by only 5¢. In the next breath Respondent is told that, without regard to quantities, less than 5¢ (presumably 4.99¢) is permissible. Again, the Commission on the one hand condemns the $50,000 unit discount, which, because it was based on a plant price percentage, produces a dollar and cents discount on

some items of less than 5¢ and of more than 5¢ on others. Yet on the other hand, the Commission grants its blessing on less than 5¢ discounts. This spectacle of blowing the extremes of hot and cold in the same order, and a voluntarily modified order at that, warrants the suspicion that the Commission is not at all sure of its ground in this case.

Finally, sub-paragraph (c) represents a completely new departure from any interpretation yet found with respect to the power of the Commission under the Clayton Act. To date the Commission has been permitted to intervene where injury to competition between producers is established. Such intervention is also proper where injury to competition can be established as between customers of a given producer. Now the Commission has advised the Respondent in sub-paragraph (c) that the Respondent cannot sell direct to a retailer at a price lower than the prices charged to a wholesaler whose customers compete with the retailer. This is, indeed, a novel idea. In effect it means that if a retailer chooses to buy a substantial portion of his salt requirements from Respondent, thereby entitling him to a quantity discount, the Respondent cannot pay that discount if *any one wholesaler* in the same trade area sells to competing retailers, but chooses to buy only a fraction of his salt requirements from Respondent. This would, to say the least, be doing business at your peril. The Commission simply lacks any vestige of authority for the assumption of such jurisdiction over business under the Clayton Act.

It should be obvious from the foregoing that, regardless of the determination of the other issues in this case, the Commission departed on a wholly unsupportable tangent when it issued the Modified Cease and Desist

Order in this case. The Order has no justification under the Act. It does not remotely parallel the allegations in the Complaint. And it is utterly inconsistent with the narrow Findings of Facts. Such being the case, nothing short of a complete vacation of that Order will satisfy the legal necessities of this case.

CONCLUSION.

The cumulative story of this case is no credit to the relatively brief history of enforcement proceedings under the Robinson-Patman Act. Under an Act directed at those vendors who, as a part of their sales policy, grant arbitrary, non-standard (and usually secret) rebates, allowances and discounts to favored customers of the vendor's own selection, the Commission saw fit to file a complaint against Respondent in which the *only* charge was that of having committed the crime of seeking to promote sales by offering to all its customers, on equal terms, certain standard quantity discounts.

Such a standard system of discounts by its very nature and operation is non-discriminatory, yet the Act is designed to cover only that which is discriminatory. The term "discriminate" connotes injury or the probability of injury. Standard discounts are not discriminatory because they do not injure, this for the obvious reason that the decision to enjoy such a discount lies with the customer and is not the subject of the vendor's arbitrary merchandising whim. If this has not been appreciated or recognized by the Commission to date, then this initial court test of the validity of such a discount system should at least command such recognition. The evidence

proved what the Complaint charged and the Answer admitted—the use of a standard discount system by the Respondent. The evidence utterly failed to show any injuries to competition attributable to Respondent's discounts: Rather, the record is clear that competition has been materially enhanced during the period covered by these proceedings.

In the face of such a Record, the Commission made a wholly unsuccessful attempt to veneer the evidence with "Findings of Fact", which neither reflect the evidence as it appears in the Record nor support the Order for which those "Findings" were manufactured. All this was then culminated by an Order which the Commission admitted was too broad, only to be followed by a Modified Order, identical in all details with the original Order except for the addition of two astounding *proviso* clauses, and which was completely beyond the Commission's jurisdiction by any one of the several tests outlined under Point IV of the Argument.

Through the whole proceedings there runs the thread of suspicion that the Commission itself lacks complete conviction in this case. It voluntarily retreated from its original Order. Then it made conc sions in the Modified Order—concessions which only served to make the Modified Order patently inconsistent on its face. The suspicion is heightened by Paragraph Nine of the Modified Findings, in which the Commission self-consciously assures the Respondent that its some 200 pages of cost sayings evidence and accompanying exhibits (R. 1389-1404; 1471-1511; 1553-1653; 1657, 1679; 1684-1708) had been reviewed by the Commission although stricken from the Record by the Trial Examiner on motion of the Commission, and this though Respondent made no effort to reinstate

that evidence and though the Commission had not felt moved to mention it in the original Findings. Nor is the suspicion allayed by the Commission's apparent equivocation in the case of *In The Matter of Standard Oil Company,* Federal Trade Commission No. 4389 (now on appeal to the Circuit Court of Appeals for the Seventh Circuit, No. 9215), which was decided subsequent to this case. There the original order contained *provisos* akin to the "less than five cents" *provisos* in the Modified Order here, but in its Modified Order the Commission dropped the *provisos.* Thus, there is an irrepressible temptation to believe that the Commission is at least to some degree aware of the tenuousness of its position in this case.

So, for all the separate and cumulative reasons contained in this brief, the Modified Order must be vacated and the Complaint dismissed.

Respectfully submitted,

L. M. McBride,

Counsel for Respondent.

BLUE PACKAGE (SCHEDULE I)

	1937	% of 1937	1938	% of 1937	1939	% of 1937	1940	% of 1937	1941	% of 1937
City of New Orleans:										
Discount Retailers	$ 6,062.09	100%	$7,313.43	120.64%	$ 8,979.07	148.12%	$10,429.28	172.04%	$11,509.44	189.86%
Discount Wholesalers	1,202.35	100%	1,189.50	98.93%	1,146.00	95.31%	1,023.00	85.08%	682.50	56.76%
Non-Discount Wholesalers Who Testified for Commission	7,312.50	100%	7,490.45	102.43%	7,782.00	106.42%	7,695.00	105.23%	8,119.50	111.04%
Other Non-Discount Wholesalers	4,828.60	100%	5,530.50	114.54%	5,993.00	124.11%	6,625.50	137.21%	6,904.50	142.99%
Louisiana Other Than New Orleans:										
Discount Retailers	4,308.59	100%	5,761.43	133.72%	6,236.57	144.75%	8,551.78	198.48%	6,521.94	151.37%
Discount Wholesalers	1,776.20	100%	2,276.00	128.14%	2,901.40	163.35%	5,061.90	284.98%	7,986.70	449.85%
Non-Discount Wholesalers Who Testified for Commission	412.50	100%	502.50	121.82%	420.00	101.82%	589.00	142.79%	481.50	116.73%
Other Non-Discount Wholesalers	2,189.00	100%	3,738.30	170.78%	4,082.00	186.48%	5,075.00	231.84%	5,890.40	269.09%
Georgia & Florida:										
Discount Retailers	39,707.85	100%	39,371.55	99.15%	44,732.43	112.65%	51,190.98	128.92%	52,376.83	131.91%
Non-Discount Retailers Who Testified for Commission	5,316.00	100%	8,014.50	150.76%	8,137.50	153.07%	8,145.00	153.21%	10,327.96	194.28%
Discount Wholesalers	27,370.00	100%	31,299.00	114.36%	39,502.50	144.33%	45,580.50	166.53%	44,751.80	163.51%
Non-Discount Wholesalers Who Testified for Commission	15,137.00	100%	19,324.50	127.66%	17,891.50	118.19%	17,812.50	117.67%	23,659.96	156.30%
Other Non-Discount Wholesalers	14,762.50	100%	16,315.50	110.52%	15,883.00	107.59%	18,078.50	122.46%	18,198.50	123.27%
North Carolina and South Carolina:										
Discount Retailers	10,961.77	100%	16,888.41	154.07%	20,635.80	188.25%	23,120.98	210.92%	29,009.16	264.64%
Non-Discount Retailers	75.00	100%	37.50	50.00%	172.50	230.00%	97.50	130.00%	225.00	300.00%
Discount Wholesalers	19,827.44	100%	23,318.99	117.61%	22,320.93	112.58%	20,775.54	104.78%	24,090.17	121.50%
Non-Discount Wholesalers Who Testified for Commission	592.50	100%	855.00	144.30%	1,162.50	196.20%	1,132.50	191.14%	1,575.00	265.82%
Other Non-Discount Wholesalers	937.50	100%	1,110.00	118.40%	1,110.00	118.40%	1,305.00	139.20%	2,025.00	216.00%
Wholesalers Purchasing From Discount Customers	31,701.00	100%	35,808.00	112.96%	42,970.75	135.55%	45,037.50	142.07%	49,242.00	155.33%
Retailers Purchasing From Discount Customers	847.50	100%	1,057.50	124.78%	1,170.00	138.05%	1,320.00	155.75%	1,627.50	192.04%

TABLE SALT OTHER THAN BLUE PACKAGE (SCHEDULE II)

	1937	% of 1937	1938	% of 1937	1939	% of 1937	1940	% of 1937	1941	% of 1937
City of New Orleans:										
Discount Retailers	$ 868.32	100%	$ 900.49	103.70%	$ 1,073.36	123.61%	$ 80.20	9.24%	$ 52.10	6.00%
Discount Wholesalers	250.40	100%	269.20	107.51%	429.85	171.67%	99.10	39.58%	117.25	46.83%
Non-Discount Wholesalers Who Testified for Commission	463.50	100%	742.25	160.14%	486.05	104.87%	732.00	157.93%	919.50	198.38%
Other Non-Discount Wholesalers	937.55	100%	1,811.87	193.26%	1,784.95	190.38%	1,289.45	137.53%	1,413.00	150.71%
Louisiana Other Than New Orleans:										
Discount Retailers	1,875.62	100%	1,622.49	86.50%	821.86	43.82%	485.78	25.90%	87.00	4.64%
Discount Wholesalers	3,054.20	100%	2,203.70	72.15%	4,038.34	132.22%	1,777.50	58.20%	2,438.73	79.85%
Non-Discount Wholesalers Who Testified for Commission	2,775.25	100%	1,025.80	36.96%	525.00	18.92%	227.50	8.20%	—	—%
Other Non-Discount Wholesalers	12,007.91	100%	14,925.91	124.30%	11,422.44	95.12%	8,566.19	71.34%	8,854.33	73.74%
Georgia and Florida:										
Discount Retailers	866.66	100%	2,918.32	336.73%	4,284.60	494.38%	2,822.20	325.64%	5,903.80	681.21%
Non-Discount Retailers Who Testified for Commission	2,531.95	100%	813.36	32.12%	967.22	38.20%	1,181.67	46.67%	1,551.75	61.29%
Discount Wholesalers	2,606.31	100%	7,924.71	304.06%	4,573.00	175.46%	3,200.77	122.81%	1,211.93	46.50%
Non-Discount Wholesalers Who Testified for Commission	6,613.71	100%	7,033.23	106.34%	6,108.60	92.36%	4,801.71	72.60%	8,669.26	131.08%
Other Non-Discount Wholesalers	13,545.38	100%	21,236.26	156.78%	14,853.41	109.66%	13,227.49	97.65%	20,311.66	149.95%
North Carolina and South Carolina:										
Discount Retailers	13,272.31	100%	11,766.27	88.65%	14,237.28	107.27%	11,806.36	88.95%	15,065.20	113.51%
Non-Discount Retailers	734.85	100%	1,334.38	181.59%	2,508.55	340.55%	477.85	64.95%	1,483.31	201.85%
Discount Wholesalers	10,729.79	100%	17,032.21	158.74%	14,505.35	135.19%	7,217.34	62.26%	12,884.82	120.08%
Non-Discount Wholesalers Who Testified for Commission	3,478.03	100%	3,388.78	97.43%	2,689.10	77.32%	2,510.66	72.19%	4,400.77	126.53%
Other Non-Discount Wholesalers	37,212.99	100%	42,484.34	114.17%	48,244.66	129.64%	33,123.34	89.01%	47,576.19	127.85%

Section 2(a) of the Clayton Act.

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, However, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established:

And Provided Further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona-fide transactions and not in restraint of trade: And Provided Further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

SUPREME COURT OF THE UNITED STATES

No. 464.—October Term, 1947.

Federal Trade Commission, Petitioner, *v.* Morton Salt Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 3, 1948.]

Mr. Justice Black delivered the opinion of the Court.

The Federal Trade Commission, after a hearing, found that the respondent, which manufactures and sells table salt in interstate commerce, had discriminated in price between different purchasers of like grades and qualities, and concluded that such discriminations were in violation of § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13.[1] It accordingly issued a cease and desist order. 39 F. T. C. 35.[2] Upon petition of the respondent the Circuit Court of Appeals, with one judge dissenting, set aside the Commission's findings and order, directed the Commission to dismiss its complaint against respondent, and denied a cross

[1] Section 2 (a) provides in part "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

[2] The original findings and order were modified by the Commission on its own motion. The controversy here deals only with the findings and order as modified.

petition of the Commission for enforcement of its order. 162 F. 2d 949. The Court's judgment rested on its construction of the Act, its holding that crucial findings of the Commission were either not supported by evidence or were contrary to the evidence, and its conclusion that the Commission's order was too broad. Since questions of importance in the construction and administration of the Act were presented, we granted certiorari. 332 U. S. 850. Disposition of these questions requires only a brief narration of the facts.

Respondent manufactures several different brands of table salt [3] and sells them directly to (1) wholesalers or jobbers, who in turn resell to the retail trade, and (2) large retailers, including chain store retailers. Respondent sells its finest brand of table salt, known as Blue Label, on what it terms a standard quantity discount system available to all customers. Under this system the purchasers pay a delivered price and the cost to both wholesale and retail purchasers of this brand differs according to the quantities bought. These prices are as follows, after making allowance for rebates and discounts:

	Per case
Less-than-carload purchases	$1.60
Carload purchases	1.50
5,000-case purchases in any consecutive 12 months	1.40
50,000-case purchases in any consecutive 12 months	1.35

Only five companies have ever bought sufficient quantities of respondent's salt to obtain the $1.35 per case price. These companies could buy in such quantities because they operate large chains of retail stores in various parts of the country.[4] As a result of this low price these five

[3] Respondent also produces and sells other kinds of salt, but the trade practices here involved only relate to table salt.

[4] These chain stores are American Stores Company, National Tea Company, Kroger Grocery Co., Safeway Stores, Inc., and Great Atlantic & Pacific Tea Company.

companies have been able to sell Blue Label salt at retail cheaper than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores.

Respondent's table salts, other than Blue Label, are also sold under a quantity discount system differing slightly from that used in selling Blue Label. Sales of these other brands in less-than-carload lots are made at list price plus freight from plant to destination. Carload purchasers are granted approximately a 5 per cent discount; approximately a 10 per cent discount is granted to purchasers who buy as much as $50,000 worth of all brands of salt in any consecutive twelve-month period. Respondent's quantity discounts on Blue Label and on other table salts were enjoyed by certain wholesalers and retailers who competed with other wholesalers and retailers to whom these discounts were refused.

In addition to these standard quantity discounts, special allowances were granted certain favored customers who competed with other customers to whom they were denied.[5]

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[5] One such customer, a wholesaler, received a special discount of 7½ cents per case on purchases of carload lots of Blue Label Salt. Respondent sold to this wholesaler at $1.42½ per case, although competing wholesalers were required to pay $1.50 per case on carload lots. The Circuit Court of Appeals held that findings of the Commission on these special allowances were supported by substantial evidence, that they were not maintained to meet lower prices of respondent's competitors, and that the allowances were discriminatory. It nevertheless set the findings aside on the ground that the Commission's finding of injury to competition from the discriminations engaged in by respondent was too general and had little evidence to support it. We think the finding and supporting evidence of injury to competition on account of these special allowances are similar to the finding and evidence with reference to the quantity discount system and need not be separately treated.

First. Respondent's basic contention, which it argues this case hinges upon, is that its "standard quantity discounts, available to all on equal terms, as contrasted for example, to hidden or special rebates, allowances, prices or discounts, are not discriminatory, within the meaning of the Robinson-Patman Act." Theoretically, these discounts are equally available to all, but functionally they are not. For as the record indicates (if reference to it on this point were necessary) no single independent retail grocery store, and probably no single wholesaler, bought as many as 50,000 cases or as much as $50,000 worth of table salt in one year. Furthermore, the record shows that, while certain purchasers were enjoying one or more of respondent's standard quantity discounts, some of their competitors made purchases in such small quantities that they could not qualify for any of respondent's discounts, even those based on carload shipments. The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

Section 2 of the original Clayton Act had included a proviso that nothing contained in it should prevent "discrimination in price . . . on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation. . . ." That section has been construed as permitting quantity discounts, such as those here, without regard to the amount of the seller's actual

savings in cost attributable to quantity sales or quanity deliveries. *Goodyear Tire & Rubber Co.* v. *Federal Trade Comm'n*, 101 F. 2d 620. The House Committee Report on the Robinson-Patman Act considered that the Clayton Act's proviso allowing quantity discounts so weakened § 2 "as to render it inadequate, if not almost a nullity."[6] The Committee considered the present Robinson-Patman amendment to § 2 "of great importance." Its purpose was to limit "the use of quantity price differentials to the sphere of actual cost differences. Otherwise," the report continued, "such differentials would become instruments of favor and privilege and weapons of competitive oppression."[7] The Senate Committee reporting the bill emphasized the same purpose,[8] as did the Congressman in charge of the Conference Report when explaining it to the House just before final passage.[9] And it was in furtherance of this avowed purpose—to protect competition from all price differentials except those based in full on cost savings—that § 2 (a) of the amendment provided "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The foregoing references, without regard to others which could be mentioned, establish that respondent's standard quantity discounts are discriminatory within the meaning of the Act, and are prohibited by it whenever they have the defined effect on competition. See *Federal Trade Comm'n* v. *Staley Co.*, 324 U. S. 746, 751.

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[6] H. Rep. No. 2287, 74th Cong., 2d Sess. 7.
[7] *Id.* at 9.
[8] Sen. Rep. No. 1502, 74th Cong., 2d Sess. 4–6.
[9] 80 Cong. Rec. 9417.

Second. The Government interprets the opinion of the Circuit Court of Appeals as having held that in order to establish "discrimination in price" under the Act the burden rested on the Commission to prove that respondent's quantity discount differentials were not justified by its cost savings.[10] Respondent does not so understand the Court of Appeals decision, and furthermore admits that no such burden rests on the Commission. We agree that it does not. First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits,[11] requires that respondent undertake this proof under the proviso of § 2 (a). Secondly, § 2 (b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices. And the Senate committee report on the bill explained that the provisos of § 2 (a) throw "upon any who claim the benefit of those exceptions the burden of showing that their case falls within them."[12] We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors.[13] This construction is consistent with the

[10] See 42 Ill. L. Rev. 556–561; 15 U. of Chi. L. Rev. 384–391; 60 Harv. L. Rev. 1167–1169.

[11] *Jaierre* v. *Central Altagracia*, 217 U. S. 502, 507–508 and cases cited.

[12] Sen. Rep. No. 1502, 74th Cong., 2d Sess. 3. See also 80 Cong. Rec. 3599, 8241, 9418.

[13] See *Moss* v. *Federal Trade Comm'n*, 148 F. 2d 378, 379, holding that proof of a price differential in itself constituted "discrimination in price," where the competitive injury in question was between sellers. See also *Federal Trade Comm'n* v. *Cement Institute et al.*, 333 U. S. —, —.

first sentence of § 2 (a) in which it is made unlawful "to discriminate in price between different purchasers of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

Third. It is argued that the findings fail to show that respondent's discriminatory discounts had in fact caused injury to competition. There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations "may be substantially to lessen competition . . . or to injure, destroy or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 742.[14] Here the Commission found what

[14] This language is to be read also in the light of the following statement in the same case, discussing the meaning of § 2 (a), as contained in the Robinson-Patman Act, in relation to § 3 of the Clayton Act:

"It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356–357. But as was held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition,' the use of the word 'may' was not to prohibit discrimina-

would appear to be obvious that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate.

Fourth. It is urged that the evidence is inadequate to support the Commission's findings of injury to competition.[15] As we have pointed out, however, the Commission is authorized by the Act to bar discriminatory prices upon the "reasonable possibility" that different prices for like goods to competing purchasers may have the defined effect on competition.[16] That respondent's quantity discounts did result in price differentials between competing purchasers sufficient to influence their resale price of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations "may

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tions having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." 324 U. S. at 738; see also *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 411.

The Committee Reports and Congressional debate on this provision of the Robinson-Patman Act indicate that it was intended to have a broader scope than the corresponding provision of the old Clayton Act. See note 18 *infra*.

[15] After discussing all of respondent's discriminations, the Commission stated: "The Commission finds that the effect of the discriminations in price, including discounts, rebates, and allowances, generally and specifically described herein may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory price is engaged and to injure, destroy, and prevent competition between those purchasers receiving the benefit of said discriminatory prices, discounts, rebates, and allowances and those to whom they are denied."

[16] The statute outlaws any discrimination the effect of which "may be substantially to lessen competition . . . or to injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

be substantially to lessen competition . . . and to injure, destroy and prevent competition."

The adequacy of the evidence to support the Commission's findings of reasonably possible injury to competition from respondent's price differentials between competing carload and less-than-carload purchasers is singled out for special attacks here. It is suggested that in considering the adequacy of the evidence to show injury to competition respondent's carload discounts and its other quantity discounts should not be treated alike. The argument is that there is an obvious saving to a seller who delivers goods in carload lots. Assuming this to be true, that fact would not tend to disprove injury to the merchant compelled to pay the less-than-carload price. For a ten-cent carload price differential against a merchant would injure him competitively just as much as a ten-cent differential under any other name. However relevant the separate carload argument might be to the question of justifying a differential by cost savings, it has no relevancy in determining whether the differential works an injury to a competitor. Since Congress has not seen fit to give carload discounts any favored classification we cannot do so. Such discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost. The trouble with this phase of respondent's case is that it has thus far failed to make such proof.

It is also argued that respondent's less-than-carload sales are very small in comparison with the total volume of its business [17] and for that reason we should reject the

[17] Respondent introduced testimony and exhibits intended to show that only one-tenth of one per cent of its sales were made at less-that-carload prices. It appears that this figure relates only to a single one-year period and was obtained by lumping together statistics on respondent's sales of table salt along with those on sales of its

Commission's finding that the effect of the carload discrimination may substantially lessen competition and may injure competition between purchasers who are granted and those who are denied this discriminatory discount. To support this argument, reference is made to the fact that salt is a small item in most wholesale and retail businesses and in consumers' budgets. For several reasons we cannot accept this contention.

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had "been too restrictive in requiring a showing of general injury to competitive conditions. . . ." The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the dis-

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other products, such as salt tablets, coarse rock salt, and sal soda. Since this proceeding is concerned only with discounts on table salts, these figures are of dubious value. Furthermore, they are limited to sales in respondent's Chicago area, whereas respondent carried on a nation-wide business.

crimination." [18] Since there was evidence sufficient to show that the less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers by the differential in price established by respondent, the Commission was justified in finding that competition might have thereby been substantially lessened or have been injured within the meaning of the Act.

Apprehension is expressed in this Court that enforcement of the Commission's order against respondent's continued violations of the Robinson-Patman Act might lead respondent to raise table salt prices to its carload purchasers. Such a conceivable, though, we think, highly improbable contingency, could afford us no reason for upsetting the Commission's findings and declining to direct compliance with a statute passed by Congress.

The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages,

[18] In explaining this clause of the proposed Robinson-Patman Act, the Senate Judiciary Committee said:

"This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, 74th Cong., 2d Sess. 4. See also H. Rep. No. 2287, 74th Cong., 2d Sess. 8; 80 Cong. Rec. 9417.

largely devoted to this single issue—injury to competition. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

Fifth. The Circuit Court of Appeals held, and respondent here contends, that the order was too sweeping, that it required the respondent to "conduct its business generally at its peril," and that the Commission had exceeded its jurisdiction in entering such an order.[19] Reliance for this contention chiefly rests on *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426. That case held that the Labor Board could not broadly enjoin violations of all

[19] The prohibiting paragraphs of the order were:

"(a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.

"(b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

"(c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.

"For the purpose of comparison, the term 'price' as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale."

the provisions of the statute merely because a single violation of one of the Act's many provisions had been found. *Id.* at 435–436. But it also pointed out that the Labor Board, "Having found the acts which constitute the unfair labor practice . . . is free to restrain the practice and other like or related unlawful acts." It there pointed out that this Court had applied a similar rule to a Federal Trade Commission order in *Federal Trade Comm'n* v. *Beech Nut Co.*, 257 U. S. 441, 455. In the latter case the Court not only approved restraint of the unlawful price-fixing practices found, but "any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company." See also *May Dep't. Stores Co.* v. *Labor Board*, 326 U. S. 376, 392–393. We think the Commission's order here, save for the provisos in (a) and (b) later considered, is specifically aimed at the pricing practices found unlawful, and therefore does not run counter to the holding in the *Express Publishing Co.* case. Certainly the order in its relation to the circumstances of this case is only designed "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board [Commission] has found to have been committed by the . . . [respondent] in the past." *Labor Board* v. *Express Publishing Co., supra*, 436–437.

The specific restraints of paragraphs (a) and (b) of the order are identical, except that one applies to prices respondent charges wholesalers and the other to prices charged retailers. It is seen that the first part of these paragraphs, preceding the provisos, would absolutely bar respondent from selling its table salt, regardless of quantities, to some wholesalers and retailers at prices different from that which it charged competing wholesalers and retailers for the same grade of salt. The Commission had found that respondents had been continuously engaged in such discriminations through the use of discounts, re-

bates and allowances. It had further found that respondent had failed to show justification for these differences by reason of a corresponding difference in its costs. Thus the restraints imposed by the Commission upon respondent are concerned with the precise unlawful practices in which it was found to have engaged for a number of years. True, the Commission did not merely prohibit future discounts, rebates, and allowances in the exact mathematical percentages previously utilized by respondent. Had the order done no more than that, respondent could have continued substantially the same unlawful practices despite the order by simply altering the discount percentages and the quantities of salt to which the percentages applied. Paragraphs (a) and (b) up to the language of the provisos are approved.

The provisos in (a) and (b) present a more difficult problem. They read: "Provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure or destroy competition among such wholesalers [retailers]." The first clause of the provisos, but for the second qualifying clause, would unequivocally permit respondent to maintain price differentials of less than five cents as between competing wholesalers and as between competing retailers.[20] This clause would appear to benefit respondent, and no challenge to it, standing alone, is here raised. But respondent seriously objects to the second clause of the proviso which qualifies the permissive less-than-five-cent differentials provided in the first clause. That qualification permits

[20] The only finding of the Commission specifically relating to five-cent differentials was: "Salt is a staple commodity with a medium turnover and is generally sold by wholesalers to their retail customers on a lower margin of profit than that received on other commodities. Consequently, the price at which the wholesaler offers his table salt is usually controlling, and a difference of five cents per case may result in the loss of a sale to a customer, not only of the salt involved but of other commodities as well, the order for which might be placed with the salt purchase."

such differentials only if they do "not tend to lessen, injure, or destroy competition." Respondent points out that where a differential tends in no way to injure competition, the Act permits it. "The Commission," so respondent urges, "must either find and rule that a given differential injures competition, and then prohibit it, or it must leave that differential entirely alone." Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not in either (a) or (b) taken action which forbids such noninjurious differentials. But other objections raised to the qualifying clauses require consideration.

One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to make findings concerning possible injury to competition. Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification. The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U. S. C. §§ 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order.

Whether on this record the Commission was compelled to exempt certain differentials of less than five cents we do

not decide. But once the Commission exempted the differentials in question from its order, we are constrained to hold that as to those differentials it could not then shift to the courts a responsibility in enforcement proceedings of trying issues of possible injury to competition, issues which Congress has primarily entrusted to the Commission.

This leaves for consideration the objection to paragraph (c) of the order which reads: "By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer." The only criticism here urged to (c) is that it bars respondent from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer. Section 2-(a) of the Act specifically authorizes the Commission to bar discriminatory prices which tend to lessen or injure competition with "any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." This provision plainly supports paragraph (c) of the order.

We sustain the Commission's order with the exception of the provisos in paragraphs (a) and (b) previously set out. Since the qualifying clauses constitute an important limitation to the provisos, we think the Commission should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary. This the Commission may do upon the present evidence and findings or it may hear other evidence and make other findings on this phase of the case, should it conclude to do so. See *Federal Trade Comm'n* v. *Royal Milling Co. et al.*, 288 U. S. 212, 218.

The judgment of the Circuit Court of Appeals is reversed and the proceedings are remanded to that court to be disposed of in conformity with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 464.—October Term, 1947.

Federal Trade Commission, Petitioner, *v.* Morton Salt Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 3, 1948.]

Mr. Justice Jackson, with whom Mr. Justice Frankfurter joins, dissenting in part.

While I agree with much of the Court's opinion, I cannot accept its most significant feature, which is a new interpretation of the Robinson-Patman Act that will sanction prohibition of any discounts "if there is a reasonable *possibility* that they 'may' have the effect" to wit: to lessen, injure, destroy or prevent competition. [Emphasis supplied.] I think the law as written by the Congress and as always interpreted by this Court requires that the record show a reasonable *probability* of that effect. The difference, as every lawyer knows, is not unimportant and in many cases would be decisive.

The law rarely authorizes judgments on proof of mere possibilities. After careful consideration this Court has, at least three times and as late as 1945, refused to interpret these laws as doing so. In 1922, in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, at 356, a unanimous Court, construing like language in § 3 of the Clayton Act, said: "But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly."

In 1930, in *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, the Court said (at

p. 298) with respect to identical language in § 7 of the Clayton Act: ". . . the Act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357 . . ." And Mr. Justice Stone wrote for the dissenting justices (280 U. S. 306): "Nor am I able to say that the McElwain Company . . . was then in such financial straits as to preclude the reasonable inference by the Commission that its business . . . would probably continue to compete with that of petitioner. See *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356–357."

With these interpretations on our books the Robinson-Patman Act was passed.

When the latter Act came before this Court in 1945, this same question was carefully considered and Chief Justice Stone, with the concurrence of all but two members of the Court and with no disagreement noted on this point, wrote:

"It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356–357. But as was held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition,' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." *Corn Products Company* v. *Federal Trade Commission*, 324 U. S. 726, 738.

It is true that later (324 U. S. at 742) the opinion uses the language as to possibility of injury now quoted in part[1] by the Court as the holding of that case. But the phrase appears in such form and context and is so irreconcilable with the earlier careful and complete statement, set out above, that the inconsistency must appear to a fair reader as one of those inadvertencies into which the most careful judges sometimes fall. It is the only authority for making a thrice-rejected rule of interpretation a prevailing one. I know of no other instance in which this Court has ever held that administrative orders applying drastic regulation of business practices may hang on so slender a thread of inference.

The Court uses overtones of hostility to all quantity discounts, which I do not find in the Act, but they are translated into a rule which is fatal to any discount the Commission sees fit to attack. To say it is the law that the Commission may strike down any discount "upon the reasonable possibility that different prices for like goods to competing purchasers may substantially injure competition," coupled with the almost absolute subservience of judicial judgment to administrative experience, cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, means that judicial review is a word of promise to the ear to be broken to the hope. The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not. That is not the law

[1] The full text of the later reference, quoted in part by the Court, is: "As we have said, the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

It seems obvious that the Court's "as we have said," refers to the earlier statement that the test is "probability" which is quoted in full above, particularly in the absence of any other citation or reference.

which Congress enacted and which this Court has uniformly stated until today.

The Robinson-Patman Act itself, insofar as it relates to quantity discounts, seems to me, on its face and in light of its history, to strive for two results, both of which should be kept in mind when interpreting it.

On the one hand, it recognizes that the quantity discount may be utilized arbitrarily and without justification in savings effected by quantity sales, to give a discriminatory advantage to large buyers over small ones. This evil it would prohibit. On the other hand, it recognizes that a business practice so old and general is not without some basis in reason, that much that we call our standard of living is due to the wide availability of low-priced goods, made possible by mass production and quantity distribution, and hence that whatever economies result from quantity transactions may, and indeed should, be passed down the line to the consumer. I think the Court's disposition of this case pretty much sanctions an obliteration of the difference between discounts which the Act would foster and those it would condemn.

It will illustrate my point to discuss only two of the discounts involved—two which the Commission and the Court lump together and treat exactly alike, but which to me require under the facts of this case quite different inferences as to their effect on competition.

In addition to a general ten-cent per case carload lot discount, there is what we may call a quota discount, by which customers who purchase 5,000 or more cases in a twelve-month period get a further rebate of 10 cents per case, while those who purchase 50,000 or more cases in such periods get an additional 5 cents per case. The application of this schedule to distribution of the table salt involved is substantially illustrated by one of the Company's exhibits, from which we find:

Cases purchased	*Number customers*	*Discount per case*
1–500	3,643	0
501–4,999	343	0
5,000–10,000	35	.10
10,000–49,999	14	.10
50,000 and over	5	.15

It thus appears that out of approximately 4,000 customers only 54 receive either of these two quota discounts in practice, and the larger one is available to only four or five major chain store organizations. The quota discounts allowed a customer are not related to any apparent difference in handling costs but are based solely on the volume of his purchases, which in turn depends largely on the volume of his sales, and these in turn are surely influenced by his lowered costs which he can reflect in his retail prices.

I agree that these facts warrant a *prima facie* inference of discrimination and sustain a finding of discrimination unless the Company, which best knows why and how these discounts are arrived at and which possesses all the data as to costs, comes forward with a justification. I agree, too, that the results of this system on respondent's customer list is enough to warrant the inference that the effects "may be substantially to lessen competition or tend to create a monopoly."

Even applying the stricter test of probability, I think the inference of adverse effect on competition is warranted by the facts as to the quota discounts. It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of salt between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly.

However, a very different problem is presented by the differential of 10 cents per case when delivered in carload lots. This carload price applies to various small purchasers who pool their orders to make a carload shipment and to all who pick up their orders, no matter how small, at the company warehouses which are maintained in ten cities. The evidence is that less than 1/10 of 1% of the respondent's total salt business fail to get the benefit of this carload-lot discount.

It does not seem to me that one can fairly draw the inference that competition *probably* is affected by the carload-lot discount. Indeed, the discount is so small in proportion to price, salt is so small an item in wholesale or retail business and in the consumer's budget that I should think it farfetched even to find it reasonably *possible* that competition would be *substantially* affected. Hence, the discount, whether more or less than the exact savings in handling, would not fall under condemnation of the statute. The incidence of this discount on customers is not arbitrarily determined by the volume of their business but depends upon an obvious difference in handling and delivery costs.

The Commission has forbidden respondent to continue this carload-lot differential. The Commission has no power to prescribe prices, so that it can order only that the differential be eliminated. Unless competitive conditions make it impossible, the respondent's self-interest would dictate that it abolish the discount and maintain the higher base price, rather than make the discount universally applicable. The result would be to raise the price of salt 10 cents per case to 99.9% of respondent's customers because 1/10 of 1% were not in a position to accept carload shipments. This is a quite different effect than the elimination of the quota discount.

It seems to me that a discount which gives a lowered cost to so large a proportion of respondent's customers and

is withheld only from those whose conditions of delivery obviously impose greater handling costs, does not permit the same inferences of effect on competition as the quota discounts which reduce costs to the few only and that on a basis which ultimately is their size.

The two types of discount involved here seem to me to fall under different purposes of the Act and to require different conclusions of fact as to effect on competition. Accordingly, I should sustain the court below insofar as it sets aside the cease and desist order as to carload-lot discounts.